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Civil Cases

Ascentive, LLC v. Opinion Corp., 2011 WL 6181452 (E.D.N.Y. Dec. 13, 2011)

by David M. Kelly

Eastern District of New York refused to preliminarily enjoin defendant's use of plaintiffs' trademarks even though defendant used plaintiffs' marks in subdomains, metatags, and advertising for a consumer-review website featuring negative reviews about plaintiffs' products and offered "reputation management services" to plaintiffs to manage those same negative reviews.

L.F.P. IP, Inc. v. Hustler Cincinnati, Inc., 2011 WL 5024356 (S.D. Ohio Oct. 20, 2011)

by Whitney Devin Cooke

Southern District of Ohio grants Larry Flynt's motion for summary judgment and enjoins use of HUSTLER marks by Larry's brother, Jimmy.

Marketquest Group, Inc. v. BIC Corp., 2011 WL 5360899 (S.D. Cal. Nov. 7, 2011)

by Michael R. Justus

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Philip Morris USA, Inc. v. Jiang, No. 11-cv-24049 (S.D. Fla. Dec. 12, 2011)

by David M. Kelly

As part of a preliminary injunction against a cybersquatter and counterfeiter, the Southern District of Florida ordered defendants' domain name registrar to redirect the infringing domain names to a website displaying the injunction and other legal documents from the lawsuit.

Weather Underground, Inc. v. Navigation Catalyst Sys., Inc., 100 U.S.P.Q.2d 1778 (E.D. Mich. Nov. 9, 2011)

by David M. Kelly

Despite defendants registering nearly 300 domain names containing misspellings of plaintiff's trademarks and using

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them for pay-per-click sites displaying competitors' ads, Eastern District of Michigan denied plaintiff's motion for summary judgment on its cybersquatting claim and rejected plaintiff's argument that bad faith could be shown based solely on defendants' "willful blindness" in registering the domains.

TTAB Cases

Benedict v. Super Bakery, Inc., 101 U.S.Q.P.2d 1089 (Fed. Cir. Dec. 28, 2011)

by Linda K. McLeod and Stephanie H. Bald

Federal Circuit affirms TTAB's entry of default judgment against Respondent and sanction of cancellation of Respondent's trademark registration for failure to comply with discovery orders. In addition, the appeals court calls into question whether the suspension of proceedings upon the filing of a dispositive motion under Rule 2.127(d) should be automatic or, as interpreted by the TTAB, only suspended following issuance of a Board Order.

Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC, Opp. No. 91195552, Canc. No. 92053001 (TTAB Nov. 16, 2011)

by Linda K. McLeod and Stephanie H. Bald

TTAB holds that burden and expense of e-discovery will weigh heavily against compelling production of electronically stored information in most cases.

UNREGISTRABLE:

Clai®voyant

by Robert D. Litowitz

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Ascentive, LLC v. Opinion Corp., 2011 WL 6181452 (E.D.N.Y. Dec. 13, 2011)

by David M. Kelly

ABSTRACT

Plaintiffs' goods and services were the subject of negative reviews from third parties on defendant's consumer-review website, "PissedConsumer.com." Plaintiffs alleged that defendant's use of plaintiffs' trademarks in subdomains, metatags, and advertising on the "PissedConsumer.com" site violated the Lanham Act and various state laws. The Eastern District of New York denied plaintiffs' motion for a preliminary injunction, finding that defendant did not use plaintiffs' marks as source identifiers and that defendant's actions did not cause a likelihood of confusion, including initial-interest confusion. It also held that defendant qualified for immunity as a service provider under the Communications Decency Act against the state law claims.

CASE SUMMARY

FACTS

Defendant Opinion Corp. ("Opinion") operated "PissedConsumer.com," a consumer-review website that allowed third parties to post negative reviews about businesses. Opinion published the negative reviews to a subdomain or URL using the business's name (e.g., **businessname**.pissedconsumer.com) and, using Google advertising, advertised competitive goods and services on the web pages. Opinion also used the business's name in the website's metatags. Opinion then offered paid "premium reputation management services" that allowed a business to respond to complaints and otherwise manage its "PissedConsumer.com" page. At issue here were negative user reviews on products made by Ascentive, LLC and Classic Brands, LLC (collectively "Plaintiffs"), accessible on Opinion's website through subdomains containing their trademarks (e.g., ascentive.pissedconsumer.com). Plaintiffs sued Opinion, alleging trademark infringement, unfair competition, and various state-law claims.

ANALYSIS

The court denied Plaintiffs' motion for a preliminary injunction. First, the court weighed the *Polaroid* likelihood-of-confusion factors and found that, although the strength-of-the-mark and degree-of-similarity factors weighed in Plaintiffs' favor, the remaining factors weighed heavily against them, including that the parties did not have "competitive proximity." Plaintiffs sold software and sleep products, respectively, whereas Opinion sold advertising and reputation-management services. Furthermore, neither Plaintiffs nor Opinion contended that their services might "bridge the gap" and enter into the other's field. And it was "clear" to the court that Opinion was not using Plaintiffs' marks as "source identifiers."

Regarding use of the Plaintiffs' marks in subdomains and in website content, the court noted that Opinion's use of the "PissedConsumer.com" domain name made "clear that [Opinion's website] is not

affiliated with trademarks the domain name incorporates." It further noted that use of the word "pissed" in the domain name and the exclusively negative reviews on the site meant that there was "little likelihood that a potential consumer visiting PissedConsumer.com would be confused about whether it was the source of [P]laintiffs' goods or whether [Plaintiffs] sponsored or otherwise approved of PissedConsumer's use of their marks," and that the "same . . . holds true for PissedConsumer's use of the [P]laintiffs' marks in the content of the . . . site itself."

Turning to metatags, the court held that Opinion's use of Plaintiffs' trademarks in metatags to manipulate search rankings did not result in initial-interest confusion because the parties did not compete and "no reasonable consumer searching for [Plaintiffs'] sites would be diverted to PissedConsumer's webpages in light of their domain names" that were clearly critical of Plaintiffs. The court also criticized the Ninth Circuit's decision in *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, which found initial-interest confusion in the Internet context from use of trademarks in metatags. Instead, it agreed with other courts that "the harm caused by initial interest confusion in the Internet context is minimal as 'with one click of the mouse and a few seconds delay, a viewer can return to the search engine's results and resume searching for the original website.'" The court added that "the technological landscape today is vastly different than it was in 1999 when the Ninth Circuit decided *Brookfield*" because search engines now use ranking algorithms with minimal, if any, weight given to metatags.

The court also held that Plaintiffs were not likely to succeed on the merits of their nontrademark state claims, including interference with contractual relations, unjust enrichment, and violations of Pennsylvania's unfair trade practices and consumer-protection laws, because Opinion had immunity under the Communications Decency Act. Specifically, the court held that Opinion operated as a "service provider," not an "information content provider," because defendant "invite[d] postings and then in certain circumstances alter[ed] the way those postings are displayed."

Finally, although the court found "some aspects of PissedConsumer's business practices troubling and perhaps unethical," it was "unable to find a legal remedy for conduct that may offend generally accepted standards of behavior." The court thus denied Plaintiffs' motion for a preliminary injunction, but noted that its decision was without prejudice to Plaintiffs' ability to seek a permanent injunction with the "benefit of full disclosure."

CONCLUSION

Although the end result here is consistent with most other "gripe site" cases, this case was unusual for two reasons. First, Opinion used Plaintiffs' marks in subdomains and metatags, and to advertise competitive goods and services, which goes beyond the extent of use in most "gripe site" cases. Second, Opinion's business model invited trademark owners to pay to manage negative reviews that Opinion solicited for its own website.

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Civil Cases

L.F.P. IP, Inc. v. Hustler Cincinnati, Inc., 2011 WL 5024356 (S.D. Ohio Oct. 20, 2011)

by Whitney Devin Cooke

ABSTRACT

This case arose out of a dispute over the ownership and use of the HUSTLER mark by brothers Larry and Jimmy Flynt, who for years were engaged in a series of lawsuits over the ownership of the family business and use of the HUSTLER trademark. Larry Flynt sued his brother Jimmy after he discontinued making royalty payments pursuant to a license that allowed Jimmy to use the HUSTLER mark for retail stores in Ohio.

On entering summary judgment for Larry Flynt, the court noted that while Jimmy Flynt may have initially used the HUSTLER mark for the Hustler stores with the implicit permission of the Hustler enterprise, the nature of that use fundamentally changed "by mutual consent" once Jimmy paid licensing fees to Larry in 2004. Whatever the parties' arrangement was when Jimmy Flynt first opened the Cincinnati store, once Jimmy agreed to begin making license payments for use of the HUSTLER mark in connection with the Cincinnati store, that earlier agreement was subsumed by the 2004 tacit license with Larry for use of the HUSTLER mark. The court further noted that Jimmy Flynt could not raise a "naked license" defense based on the doctrine of licensee estoppel.

CASE SUMMARY

FACTS

Larry Flynt began using the HUSTLER mark in the early 1970s and first registered the HUSTLER mark in 1975. Since that time, he has used and registered many other HUSTLER marks himself or through the Larry Flynt Revocable Trust and L.F.P. IP, Inc. ("LFP") (collectively "Larry").

In the four decades since Larry began using the HUSTLER mark, Larry's brother Jimmy Flynt ("Jimmy") and his family members have either worked for the Hustler enterprise and/or owned or operated corporations associated with the enterprise. In 1997, Jimmy opened Hustler News and Gifts in Cincinnati, Ohio, without a license from Larry and without paying Larry for the use of the HUSTLER name. Hustler News and Gifts later became Hustler Cincinnati, Inc. ("Hustler Cincinnati"). The Cincinnati store that Jimmy opened was the first retail store to use the Hustler name. In 2001, Jimmy opened another store, Hustler Hollywood, in Monroe, Ohio, and formed Hustler Hollywood Ohio, Inc. ("HH Ohio") to operate the Monroe store. Unlike the Cincinnati store, HH Ohio did have a written license with Larry for use of the HUSTLER name, under which HH Ohio paid licensing fees to Larry. In 2004, the previous relationship Larry and Jimmy maintained between Hustler Cincinnati and LFP changed and became parallel to the arrangement the Monroe store had with LFP. There was a written but unsigned license agreement covering Hustler Cincinnati dated November 1, 2004. And, even without an executed agreement, Hustler Cincinnati paid LFP a lump-sum figure for "backdated" licensing fees, and began

paying licensing fees going forward.

In 2007, following a series of family disagreements, Jimmy was fired from the family business and immediately ceased paying licensing fees for use of the HUSTLER mark in connection with the Ohio stores. Larry then sued Jimmy for false designation of origin and unfair competition under federal and state law.

ANALYSIS

Larry moved for summary judgment on infringement of the HUSTLER marks by Jimmy. In his motion, Larry sought a permanent injunction with respect to his trademark claims based on Jimmy's unauthorized use as a former licensee.

Jimmy crossed-moved for summary judgment. Jimmy's position was that Larry could not prohibit him from using the HUSTLER mark because Jimmy was the senior user of the HUSTLER mark in connection with a retail store, and his early license-free use in connection with the Cincinnati store was done with Larry's implicit permission. Jimmy also took the position that the parties' subsequent licensing arrangement was the result of a "sham" transaction.

The court noted that although Jimmy may have initially used the HUSTLER mark for the Hustler stores at issue with the implicit permission of the Hustler enterprise, the nature of that use fundamentally changed "by mutual consent" once Hustler Cincinnati paid licensing fees to Larry in 2004. That arrangement lasted for years "uninterrupted and without protest . . . until family dynamics soured their relationship" and Jimmy refused to pay licensing fees. The court further found that the parties' "objective conduct" demonstrated that the Cincinnati store operated in the same manner as the Monroe store, and, thus, whatever the parties' arrangement was prior to 2004 was subsumed by the parties' agreement that year, under which Jimmy made license payments to Larry for Jimmy's use of the HUSTLER mark in connection with the Cincinnati store.

With regard to Jimmy's argument that the license at issue constituted an unenforceable "naked" license based on a lack of quality control on the part of the licensor, the court agreed with Larry that the level of control required is "minimal," and found convincing evidence of "quality control efforts" undertaken by other members of the Flynt family at the Monroe and Cincinnati stores. The court further noted that the "family interconnectedness present in the Hustler enterprise" was sufficient to satisfy the control requirement. In addition, the court cited the purpose of the control requirement, namely, the protection of the public from goods lacking the normal quality of goods sold under a trademark, and found that neither party had suggested that the quality of Hustler goods differed in any way among Hustler retail stores around the country.

The court further noted that Jimmy could not raise a "naked license" defense based on the doctrine of licensee estoppel. As the court noted, the "licensing arrangement that Jimmy entered into operates as an acknowledgment that Larry owns a valid 'Hustler' mark and, by extension, that Jimmy does not." Consequently, "[t]he implied license thus prohibits Jimmy from raising any defense he may have had prior to entering the arrangement." The court dismissed Jimmy's arguments that licensee estoppel applies only to "written, clear and signed licensing agreements." Once Jimmy licensed the HUSTLER mark from Larry, he "effectively extinguished any claim he may have had to use the Hustler trademark in connection with the Hustler Cincinnati store or to challenge Larry's conduct in connection with the mark."

The court agreed with Larry that a likelihood of confusion existed as a matter of law where a former licensee continues to use a licensed trademark after the licensing arrangement has ended. Summary judgment was thus entered for Larry.

CONCLUSION

This decision is a reminder that the licensee-estoppel doctrine may foreclose a challenge by a licensee against a licensor regarding the validity and ownership of a trademark covered by the license. This case is interesting because it applies the licensee-estoppel doctrine in the context of a "naked license" defense by the licensee.

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Civil Cases

Marketquest Group, Inc. v. BIC Corp., 2011 WL 5360899 (S.D. Cal. Nov. 7, 2011)

by Michael R. Justus

ABSTRACT

The Southern District of California denied a preliminary injunction based on descriptive fair use where the defendant used a descriptive phrase identical to plaintiff's incontestable trademark in connection with nearly identical products. The court held that the context in which defendant used the phrase and the inclusion of its housemark with the phrase demonstrated that defendant used the phrase "otherwise than as a mark" and solely in its descriptive sense.

CASE SUMMARY

FACTS

Plaintiff Marketquest Group, Inc. ("Marketquest") sells customizable promotional products, including pens, using the registered trademarks ALL-IN-ONE and THE WRITE CHOICE. Defendants BIC Corporation, BIC USA, Inc., and Norwood Promotional Products (collectively "BIC") also sell pens and customizable promotional products. BIC began using the phrases "The Write Pen Choice" and "All in ONE" in its advertising for its pens and other products.

Marketquest sued BIC in the Southern District of California for trademark infringement and unfair competition, and later moved for a preliminary injunction. Marketquest's preliminary injunction motion focused almost exclusively on the ALL-IN-ONE mark and, thus, the court held that Marketquest waived its request for a preliminary injunction regarding the mark THE WRITE CHOICE.

ANALYSIS

The court applied the Ninth Circuit's four-part test for determining whether the moving party is entitled to a preliminary injunction. In particular, to succeed on a motion for a preliminary injunction, the movant must show (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest.

Turning to Marketquest's likelihood of success on the merits, the court first examined whether Marketquest owned a valid, protectable interest in the ALL-IN-ONE mark. BIC claimed that Marketquest's ALL-IN-ONE registrations were procured fraudulently or the mark was abandoned. Regarding BIC's fraud claim, the court rejected BIC's theory that Marketquest's registrations were invalid because it never intended to use the ALL-IN-ONE mark on the products themselves, and it only used the mark in advertising for Marketquest's products and services. The court held that Marketquest's extensive use of the mark on its website and in its catalogs to identify its customizable product lines, combined with evidence showing that it did in fact use the ALL-IN-ONE mark on some of its products,

was sufficient to defeat BIC's fraud claim. The court likewise rejected BIC's related claim of abandonment, holding that BIC failed to provide support for the proposition that Marketquest's use of the ALL-IN-ONE mark in advertising for its products did not constitute use in commerce for purposes of the Lanham Act.

The court then analyzed the Ninth Circuit's eight-factor *Sleekcraft* test for weighing the likelihood of confusion in trademark-infringement cases. The court focused much of its analysis on two factors: (1) the strength of Marketquest's ALL-IN-ONE mark; and (2) the similarity of the parties' marks.

The court first held that Marketquest's ALL-IN-ONE mark was "conceptually strong." The court noted that two of Marketquest's four federal registrations for the mark had become incontestable and were thus presumed to have acquired distinctiveness. Further, the court held that the ALL-IN-ONE mark was at least "suggestive" and thus inherently distinctive because the mark did not immediately convey that Marketquest offered customized imprinting services. Finally, the court found that there was insufficient evidence to decide whether Marketquest's mark enjoyed "marketplace strength." On balance, the strength-of-the-mark factor weighed in Marketquest's favor.

Turning to the similarity of the parties' marks, the court initially noted that the marks are identical when standing alone. The court recognized, however, that BIC's "All in ONE" phrase was always used together with its NORWOOD housemark. The court acknowledged that the presence of a housemark can either reduce or increase the likelihood of confusion in a given case, depending on the circumstances. In particular, the presence of a housemark can increase the likelihood of confusion where reverse confusion is alleged. The court agreed with Marketquest that such reverse confusion was possible here because BIC's use of the ALL IN ONE mark below its prominent display of the NORWOOD housemark on its catalog covers may lead consumers to believe that BIC, not Marketquest, is the source of Marketquest's ALL-IN-ONE products. The court weighed the possibility of reverse confusion against the fact that BIC's use of the "All in ONE" phrase was typically accompanied by explanatory text that demonstrated BIC's descriptive use of the "All in ONE" phrase. For example, the catalog included the text, "Our primary product resource, featuring all product lines in ONE catalogue." On balance, the court decided that the similarity-of-the-marks factor slightly favored Marketquest.

The court briefly analyzed the remaining *Sleekcraft* factors and found that the majority of the factors favored Marketquest. Accordingly, the court concluded that there was at least "some" likelihood of confusion.

The court's analysis did not end there, however, as BIC had raised the affirmative defense of fair use. Specifically, BIC argued that it used the "All in ONE" phrase solely in its descriptive, nontrademark sense to indicate that one particular catalog was a catch-all catalog containing all of BIC's customizable products. The court agreed with BIC for several reasons. First, the court held that although Marketquest's ALL-IN-ONE mark is inherently distinctive, it is nonetheless a phrase commonly used by companies in general to describe the comprehensive nature of their services. Further, the court found that the context in which BIC used the "All in ONE" phrase demonstrated that it was used "otherwise than as a mark" and solely in its descriptive sense. In particular, the court pointed to the inclusion of the NORWOOD housemark and the explanatory text indicating the omnibus nature of the catalogs. Finally, the court held that there was no evidence of bad faith on the part of BIC in its use of the "All in ONE" phrase. Because the court found that BIC was likely to prevail on its fair-use defense, Marketquest did not make the required showing that it was likely to succeed on the merits. Accordingly, the court denied Marketquest's request for preliminary injunctive relief without reaching the remaining preliminary injunction factors.

CONCLUSION

This case demonstrates the potency of the fair-use defense as well as the potential pitfalls of selecting a common phrase as a trademark. Even where a third party uses wording identical to a plaintiff's inherently distinctive mark for nearly identical products, the fair-use defense might still trump a finding of a likelihood of confusion.

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Civil Cases

Philip Morris USA, Inc. v. Jiang, No. 11-cv-24049 (S.D. Fla. Dec. 12, 2011)

by David M. Kelly

ABSTRACT

Defendants used nearly sixty domain names containing plaintiff's marks for websites selling counterfeit cigarettes bearing those marks. The court granted plaintiff's *ex parte* motion for a preliminary injunction. In addition to enjoining defendants from using plaintiff's marks, the court ordered Western Union to hold any payments made to defendants from U.S. customers and ordered defendants' domain name registrar to redirect defendants' domain names to a website displaying copies of the injunction and other documents from the lawsuit.

CASE SUMMARY

FACTS

Zhilin Jiang and other online merchants (collectively "Defendants") sold counterfeit cigarettes using about sixty domain names containing Philip Morris USA, Inc.'s ("Philip Morris") marks, including MARLBORO, KOOL, and NEWPORT (e.g., marlborocigarettes.biz). Philip Morris purchased counterfeit goods from Defendants using both the Western Union and PayPal payment services. Philip Morris sued Defendants for trademark counterfeiting and infringement, false designation of origin, and cybersquatting. The court initially issued a temporary restraining order in which it ordered Defendants' domain name registrar to redirect Defendants' domain names to "servingnotice.com/jiang/index.html," a website posting a copy of the complaint and summons. The court also allowed Philip Morris to serve Defendants by e-mail and by posting the court documents on the same website under the assumption that Defendants would attempt to access their domain names and thus see the court documents.

ANALYSIS

At issue in this decision was Philip Morris's motion for a preliminary injunction, which the court granted. The court held that "[Philip Morris] has a very strong probability of proving at trial that consumers are likely to be confused by Defendants' advertisement . . . and distribution of cigarettes bearing counterfeits of [Philip Morris's] mark." It also held that if it did not grant a preliminary injunction, Philip Morris would suffer "immediate and irreparable injury" if Defendants continued to operate "nearly sixty commercial Internet websites."

The court ordered the "locking" of all potentially infringing domain names and enjoined Defendants from, among other things, manufacturing or selling any goods bearing Philip Morris's marks and using Philip Morris's marks in any domain names. It also ordered Western Union to hold any money sent from U.S. customers to Defendants and to provide to Philip Morris records of all money transfers to Defendants relating to the counterfeit goods. In addition, it ordered Defendants' domain registrar to redirect all of the disputed domain names to "servingnotice.com/jiang/index.html," where Philip Morris posted the court

docket along with copies of all documents filed with the court, including the preliminary injunction.

CONCLUSION

This decision is of interest because it is the latest in a series of recent cases where the court, as one part of an injunction, ordered a domain name registrar to redirect infringing domain names to a website about the lawsuit. The District Court of Nevada issued similar orders in *Tiffany (NJ), LLC v. 925LY.COM*, No. 2:11-cv-00590 (D. Nev. Sept. 27, 2011), and *Chanel, Inc. v. Does*, No. 2:11-cv-01508 (D. Nev. Nov. 14, 2011).

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Civil Cases

Weather Underground, Inc. v. Navigation Catalyst Sys., Inc., 100 U.S.P.Q.2d 1778 (E.D. Mich. Nov. 9, 2011)

by David M. Kelly

ABSTRACT

Defendants registered domain names in bulk and made money from pay-per-click advertising on the corresponding websites. Plaintiff alleged that defendants engaged in cybersquatting by registering over 200 domain names containing misspellings of plaintiff's trademarks. The court denied plaintiff's motion for summary judgment because plaintiff could not show as a matter of law that defendants had a bad-faith intent to profit from plaintiff's trademarks.

CASE SUMMARY

FACTS

Plaintiff Weather Underground, Inc. ("WUI") operated a weather website under the mark WEATHER UNDERGROUND and other marks. Defendants Navigation Catalyst Systems, Inc., Connexus Corp., and Firstlook, Inc. (collectively "Defendants") registered domain names in bulk and made money from posting pay-per-click advertising links on websites associated with these domains. Plaintiff alleged that Defendants violated the Anticybersquatting Consumer Protection Act ("ACPA") by registering 288 domain names consisting of common misspellings of WUI's trademarks, i.e., typosquatting. WUI filed a UDRP complaint against forty-one of these domain names, and the UDRP panel held for WUI, finding that Defendants "intentionally us[ed] the disputed domain names for commercial gain through a likelihood of confusion" and registered and used the disputed domain names in bad faith. WUI then filed this lawsuit and the parties cross-moved for summary judgment as to whether WUI could, as a matter of law, show that Defendant's had a bad-faith intent to profit from WUI's marks.

ANALYSIS

Regarding WUI's motion for summary judgment, WUI failed to show as a matter of law that all of Defendants' disputed domain names were confusingly similar to WUI's marks. Plaintiff asked the court to defer the analysis of whether the marks were confusingly similar until after the statutory damages phase of the case. The court declined this request and held that the confusing similarity analysis was an essential element to proving the cybersquatting claim.

WUI also failed to show as a matter of law Defendants' bad-faith intent to profit from WUI's marks. Defendants claimed they did not know about WUI's marks before registering the domain names, but WUI argued that Defendants should have known and acted "willfully blind" with respect to WUI's ownership of the WEATHER UNDERGROUND marks. The court disagreed, holding that a "willful blindness" standard should not be applied to the ACPA's bad-faith requirement. It noted that WUI's "argument has no support in case law" and that it appeared "no court has applied a willful blindness standard to a cybersquatting case."

WUI also claimed that Defendants attempted to sell the domain name by including an "inquiry option" on their website that Defendants used to "solicit the sale of their sites." The court, however, held that a question of fact existed, especially because Defendants included a disclaimer that "the existence of this [inquiry option] form does not constitute an offer to sell this domain." WUI also attempted to show bad faith by pointing to Defendants' registration of multiple domain names containing other third-party trademarks and their involvement in other cybersquatting litigation. The court, however, held that while this was "the strongest evidence" of bad faith presented by WUI and created an inference of bad faith, it could not "be assessed in a vacuum" and that other unspecified evidence "plays into the analysis."

The court found no evidence of Defendants' "good faith" and thus denied Defendants' motion for summary judgment. Even though Defendants testified that they did not know about WUI's mark before the UDRP proceeding, the court held that such evidence did not show an absence of bad faith as a matter of law. Instead, it simply created a question of fact as to the credibility of Defendants' testimony.

CONCLUSION

This decision is of interest because of WUI's reliance on a "willful blindness" standard to attempt to establish WUI's bad-faith intent. This argument ultimately has a better chance of success against a party that, like the Defendants here, registers massive quantities of domain names for profit, especially if the trademark owner has previously put the registrant on notice of its trademark rights.

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TTAB Cases

Benedict v. Super Bakery, Inc., 101 U.S.Q.P.2d 1089 (Fed. Cir. Dec. 28, 2011)

by Linda K. McLeod and Stephanie H. Bald

ABSTRACT

Respondent failed to timely respond to Petitioner's discovery requests on multiple occasions, including in violation of two TTAB orders. Instead of responding to discovery after the second TTAB order to do so, Respondent filed a summary judgment motion. Petitioner filed a motion for default judgment as a discovery sanction. The TTAB granted Petitioner's motion and denied Respondent's motion for summary judgment as moot. Respondent appealed on the ground that the proceeding should have been automatically suspended upon the filing of his summary judgment motion, and the Federal Circuit vacated the default judgment and remanded the case to the TTAB for a determination of whether the proceeding should have automatically been suspended under the Trademark Rules. The TTAB held that suspension was not automatic and was inappropriate under the circumstances, and reentered judgment against Respondent. Respondent again appealed to the Federal Circuit, contending that the TTAB misinterpreted and misapplied Trademark Rule 2.127(d), which was unqualified in its requirement that when a summary judgment motion is filed, the case "will be suspended by the Trademark Trial and Appeal Board . . . and no party should file any paper which is not germane to the motion except as otherwise specified in the Board's suspension order." The Federal Circuit agreed with Respondent that the rule did not clearly state the TTAB's position, and that its ambiguity did not support the extreme sanction of default judgment. Nevertheless, the Federal Circuit affirmed the TTAB's entry of default judgment based on the record, which showed that Respondent repeatedly failed to comply with the TTAB's discovery orders.

CASE SUMMARY

FACTS

Ward E. Benedict ("Respondent") owned a trademark registration for the mark G THE GOODYMAN and design for pepperoni sticks, cookies, cakes, tarts, rice cakes, strudels, and donuts. Super Bakery, Inc. ("Petitioner") owned a trademark registration for the mark GOODY MAN for cupcakes, and filed an application to register the mark GOODY MAN for cupcakes, marshmallow treats, glazed rings, cookies, donuts, buns, fruit pies, muffins, and snack cakes. Petitioner's application was refused registration based on a likelihood of confusion with Respondent's G THE GOODYMAN registration.

Petitioner sought cancellation of Respondent's registration for the G THE GOODYMAN mark on grounds of fraud and abandonment, and during the course of that proceeding served discovery requests on Respondent. Respondent subsequently wrote to Petitioner's counsel requesting an extension of its time to respond. Respondent contended that Petitioner never responded to the extension request, while Petitioner argued that it responded by e-mail, agreeing to the extension and requesting additional documents. In any event, Respondent never responded to the discovery requests.

Petitioner then filed a combined motion to compel discovery responses and a request for suspension. Respondent did not respond to the motion and the TTAB issued an order granting the motion to compel as unopposed. Pursuant to that order, Respondent was allowed thirty days to serve full and complete responses without objection to Petitioner's outstanding discovery requests. Again, Respondent failed to serve any discovery responses, prompting Petitioner to file a motion for default judgment as a sanction based on Respondent's failure to comply with the TTAB's discovery order.

Shortly thereafter, Respondent filed a motion for reconsideration of the TTAB's order compelling Respondent to respond to the outstanding discovery requests, stating that he never received Petitioner's motion to compel discovery, and that he did not receive the TTAB's order granting the motion until weeks after it issued. While observing that there was no proof of service of Petitioner's motion, the TTAB denied Respondent's motion as untimely because it had been filed almost two months after the TTAB's order issued, and a request for reconsideration must be filed within one month of the issuance of the order or decision. The TTAB admonished Respondent for failing to provide the discovery, held that Petitioner's requests for admissions were deemed admitted pursuant to Trademark Rule 36(a)(3), and ordered Respondent again to provide full and complete responses to Petitioner's discovery requests without objection within thirty days. The TTAB denied Petitioner's request for default judgment.

Notwithstanding this order, Respondent still did not respond to any of Petitioner's discovery requests. Instead, one day before the discovery response deadline, Respondent filed a motion for summary judgment, requesting denial of Petitioner's petition for cancellation on the ground that the cancellation issue was res judicata because of the PTO's rejection of Petitioner's trademark application for the mark GOODY MAN on the ground of likelihood of confusion with Respondent's registration for the mark G THE GOODY MAN. Respondent invoked the procedure of Trademark Rule 2.127(d), which provides:

> [W]hen any party files . . . a motion for summary judgment, or any other motion which is potentially dispositive of a proceeding, the case will be suspended by the Trademark Trial and Appeal Board with respect to all matters not germane to the motion and no party should file any paper which is not germane to the motion except as otherwise specified in the Board's suspension order. If the case is not disposed of as a result of the motion, proceedings will be resumed pursuant to an order of the Board when the motion is decided.

The TTAB suspended the proceedings pending determination of Respondent's motion for summary judgment eighteen days after that motion was filed. In responding to Respondent's motion for summary judgment, Petitioner filed a second motion for sanctions, asking the TTAB to enter judgment against Respondent for his failure to comply with the TTAB's orders. In considering Petitioner's motion for sanctions, the TTAB described Respondent's motion for summary judgment as a "likely effort to avoid his discovery obligations once again." The TTAB found that Respondent's discovery obligations were not suspended automatically upon his filing of the summary judgment motion, but only after the TTAB, eighteen days later, ordered the suspension of the proceedings. Because Respondent had failed to respond to Petitioner's discovery requests and had not complied with the TTAB's two discovery orders, the TTAB granted Petitioner's motion for sanctions, entering default judgment against Respondent, cancelling Respondent's registration, and denying Respondent's motion for summary judgment as moot.

Respondent appealed the TTAB's decision to the Federal Circuit on the ground that Respondent's obligation to comply with the TTAB's discovery sanctions should have been deemed suspended automatically upon the filing of Respondent's motion for summary judgment, including any pending discovery requests or discovery orders pursuant to Rule 2.127(d), which states that "no party should file any paper" after a motion is filed for summary judgment. Respondent thus argued that the TTAB incorrectly granted Petitioner's motion for discovery sanctions. The Federal Circuit vacated the default judgment and remanded the case for consideration of the application of Trademark Rule 2.127(d) to the facts of the case.

On remand, the TTAB explained that the mere filing of a motion for summary judgment does not

automatically suspend a proceeding. Rather, only an order of the TTAB formally suspending proceedings has such effect. The TTAB explained that it had considered and declined to adopt an automatic suspension of proceedings, and referred to the PTO summary of the notice-and-comment exchange on the rule when it was proposed, which stated:

> Comments: One organization suggested the section should be amended to provide that the filing of a potentially dispositive motion automatically suspends proceedings, without any action by the Board.
>
> Response: The suggested modification has not been adopted. A variety of motions are potentially dispositive, including a motion for sanctions in the form of entry of judgment. Because of the number of situations in which a party may make a potentially dispositive motion, it is believed better for the Board to determine whether proceedings should be suspended based on the situation presented by the particular case.

Accordingly, Respondent was obligated to respond to Petitioner's discovery requests as ordered by the TTAB until a formal suspension of the proceeding was issued. The TTAB found that filing a motion for summary judgment did not constitute good cause for not complying with the discovery order. By footnote, the TTAB also indicated that Respondent's summary judgment motion was without merit. Respondent again appealed the TTAB's decision to the Federal Circuit.

ANALYSIS

On appeal, Respondent argued that the TTAB misinterpreted and misapplied Trademark Rule 2.127(d), which is unqualified in its requirement that when a summary judgment motion is filed, the case "will be suspended by the Trademark Trial and Appeal Board . . . and no party should file any paper which is not germane to the motion except as otherwise specified in the Board's suspension order." Respondent argued that the TTAB had restated the rule, and that it was unfair to apply the restatement retroactively to him because he relied on its clear and plain terms.

The Federal Circuit agreed with Respondent that Rule 2.127(d) did not clearly present the interpretation of the rule that the TTAB attributed to it. The interpretation only became clear if the rule was considered with the PTO "comment," and that comment was not stated in the rule as adopted. Specifically, the rule does not state that no suspension shall occur until the TTAB separately acts to impose it, and that any filing deadlines will remain in force despite the rule's prohibition on filing. Further, the rule does not state that the requirement that no papers should be filed does not come into effect when a motion for summary judgment is filed, despite the rule's prohibition. Accordingly, the Federal Circuit found that the ambiguity of Rule 2.127(d) did not support the extreme sanction of default judgment.

Nevertheless, the Federal Circuit found that default judgment was well supported for other reasons. Specifically, Respondent had failed to comply with discovery requests and orders for two years. The TTAB had discussed Respondent's repeated noncompliance with Petitioner's discovery requests and his noncompliance with the TTAB's orders. And the TTAB's finding that there was no reason to assume that, given additional opportunities, Petitioner would fulfill its obligations as a party to the proceeding in the future, was supported by the entire experience of the case. Thus, the Federal Circuit found that the TTAB had not abused its discretion in granting default judgment because of Respondent's repeated failures to comply with established and reasonable procedural orders, and the appeals court affirmed the TTAB's decision.

CONCLUSION

The Board has taken the position that a proceeding is *not* automatically suspended upon the filing of a motion for summary judgment. This Federal Circuit decision, however, calls into question whether that position is sufficiently supported by Trademark Rule 2.127. In addition, this decision reaffirms that default judgment may be warranted in cases of repeated failure to comply with reasonable orders of the TTAB, when it is apparent that a lesser sanction would not be effective.

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TTAB Cases

Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC, Opp. No. 91195552, Canc. No. 92053001 (TTAB Nov. 16, 2011)

by Linda K. McLeod and Stephanie H. Bald

ABSTRACT

Applicant filed a motion to compel certain electronically stored information ("ESI") from Opposer. The TTAB explained that neither the Federal Rules nor the Trademark Rules dictate how extensive ESI discovery should be. Because the parties had not reached agreement on the form of e-discovery production before responding to each other's discovery requests, the TTAB held that Applicant could not insist that Opposer start its production over using the same methods used by Applicant, namely, attorney-supervised ESI retrieval and searching. Further, Opposer's failure to conduct this specific type of e-discovery was not necessarily inadequate under the circumstances of the case.

CASE SUMMARY

FACTS

Princeton Vanguard, LLC ("Applicant") owns a Supplemental Register registration for the mark PRETZEL CRISPS, in standard characters and with PRETZEL disclaimed, for "pretzel crackers" and seeks a Principal Register registration for the same mark for the same goods under Section 2(f). In its petition to cancel and its notice of opposition, Frito-Lay North America, Inc. ("Opposer") alleged that (1) Opposer and others in the snack-food industry have a present and prospective right to use the term "pretzel crisps" generically and/or descriptively in their business; and (2) Applicant's mark is generic. In its notice of opposition, Opposer also pleaded as an additional ground that Applicant's mark is "merely descriptive" and has not acquired distinctiveness. Applicant denied the salient allegations in Opposer's pleadings.

During their discovery conference, the parties discussed ESI discovery and agreed on the format in which ESI would be produced (.pdf format). The parties did not, however, agree on a protocol for identifying and segregating potentially responsive ESI, on who should review the ESI to determine whether the production of particular documents or information would be appropriate, nor upon methods of searching the ESI, such as the use of "keywords" to identify documents and information responsive to each other's discovery requests.

The parties exchanged initial sets of written discovery requests, both of which requested the production of ESI. In the "Definitions and Instructions" accompanying its discovery requests, Applicant stated that "[c]omputer files should be provided in electronic form on CD-ROMs in the first instance rather than printouts on paper," and Opposer's "Definitions and Instructions" indicate that "[t]hese requests require [Applicant] to produce all documents and electronically stored information in [Applicant's] 'possession, custody, or control.'"

During the spring and summer of 2010, Applicant produced documents responsive to Opposer's discovery requests, including ESI, on a "rolling" basis. Applicant claimed that it initially identified more than 1.65 million electronic files of potential relevance and its counsel "manually reviewed" over 85,000 of these electronic files, and that in 2010 alone, Applicant incurred approximately $200,000 in fees associated with electronic discovery. Applicant produced over 40,000 electronic documents in 2010. Applicant anticipated producing tens of thousands of additional documents, and estimated its fees to be over $100,000 in 2011 in connection with the document collection and production.

Opposer also began producing documents during the spring and summer of 2010, but its production was less robust than Applicant's and contained no e-mails other than a summary spreadsheet of sales data and an internally generated list of trademarks. Applicant objected to Opposer's production as deficient, especially with regard to electronic files. Applicant claimed that Opposer did not conduct an "attorney-managed electronic retrieval and search." Opposer argued that while it conducted a "reasonable investigation to locate, gather and produce documents reasonably responsive" to Applicant's discovery requests, including by identifying document custodians and asking them to search their own files for ESI on the computers, attorney-supervised searches for ESI on the computers of employees who received Opposer's document retention notice would cost Opposer an additional $70,000-$100,000. Opposer argued that this expense would far outweigh the benefit for any information in determining the matters at issue in this proceeding. Opposer specifically refused to take forensic images of its employees' computers.

After meeting and conferring on the above issues, Applicant filed a motion to compel the production of additional documents from Opposer. Applicant argued that Opposer's failure to conduct an attorney-supervised ESI retrieval search (using appropriate keywords) and review had substantially prejudiced Applicant's ability to defend this proceeding; that cost or burden was no excuse where relying on the custodians to search their own files had clearly proven insufficient; that Opposer could not decline to carry out the type of attorney-supervised ESI collection and review that Applicant had already undertaken; and that Applicant was entitled to discovery regarding how Opposer's "businesspeople assess the pretzel cracker market (in which [Opposer] was a player), their consideration of the PRETZEL CRISPS mark and products, and the names and terms they use in discussing these subjects." Opposer responded by arguing that Applicant is engaged in an ongoing document dump, that it was Applicant's fault for not working with Opposer to avoid an excessive production, and questioned whether Applicant incurred the associated costs in connection with a district court action relating to issues similar to those in the TTAB proceeding. Opposer also claimed to have identified nineteen of its employees deemed most likely to have information relevant to this proceeding, and instructed them to search their records, including ESI, using categories keyed to Applicant's requests. Opposer argued that the information that could be obtained through "forensic imaging" of the custodians' (i.e., employees') computers was not reasonably accessible, and the cost of obtaining it far outweighed the need for the information, given that Opposer's claims relate solely to Applicant's mark, and Opposer had not used or considered using the term "pretzel crisps." Opposer also argued that much of the information Applicant sought related not to whether Applicant's mark was descriptive or generic, but instead to "competitive business issues between the parties," who are direct competitors, and that Applicant's discovery requests "constitute a fishing expedition" for the irrelevant information. Opposer further claimed that its production was sufficient and that it had only declined to produce "trade secret business information which has no bearing on the genericness of 'pretzel crisps' as used by Applicant."

ANALYSIS

The TTAB first noted that while the federal courts routinely deal with e-discovery disputes, e-discovery disputes have been relatively rare in TTAB proceedings due, most likely, to the TTAB's limited jurisdiction, under which the TTAB is empowered with only the right to register. Further, the scope of discovery in TTAB proceedings is generally narrower than in court proceedings, especially court proceedings involving allegations of infringement, and/or in which both parties are, unlike here, making extensive use of their marks. Accordingly, the TTAB found that it was not improper that the Opposer generally treated discovery in TTAB proceedings differently than discovery in other types of trademark litigation (including, for example, not imposing a "litigation hold" after a TTAB proceeding, where

Opposer does impose such a hold in district court litigations). Further, the TTAB explained that it is well settled that Opposer need not provide discovery of ESI from sources that it identifies as not reasonably accessible because of undue burden or cost. On the other hand, the TTAB noted that ESI must be produced in TTAB proceedings where appropriate and Opposer had the duty to satisfy the legitimate discovery needs of its adversary.

The TTAB next looked at whether Opposer's ESI production efforts were adequate as a general matter. The TTAB explained that neither the Federal Rules nor the Trademark Rules dictate how extensive ESI discovery should be. Here, however, although the parties discussed ESI discovery during their discovery conference and thereafter, they reached agreement only on the form of production prior to responding to each other's discovery requests. Having failed to reach agreement with Opposer and many of the most crucial ESI-related issues in advance of the parties' productions, the TTAB found that Applicant could not fairly insist, after the fact, that Opposer must start its ESI search and production over, this time engaging in a process similar to Applicant's. Further, the mere fact that Applicant chose on its own to engage in broad, expensive ESI collection, review, and production similar to or repetitive of discovery it conducts in federal court actions was not a basis upon which to compel Opposer to do the same. Nor did Opposer's failure to conduct an attorney-supervised ESI retrieval search in the same manner as Applicant mean that Opposer's ESI discovery efforts were necessarily inadequate under the circumstances of the case.

The TTAB explained that in the federal courts (where discovery is generally expected to be more extensive than in TTAB proceedings), there is an increasing focus on the question of proportionality, and on whether the type of extensive ESI discovery Applicant advocates is always justified. The TTAB also pointed out that the Federal Circuit had issued an E-Discovery Model Order to address, among other things, the disproportionate cost of e-discovery in patent cases, where discovery is often broader than in TTAB proceedings. And that Model Order questioned many of the positions that Applicant advocated in this case, including the practice of gathering huge amounts of information at the front of a case and running broad key searches as the issues emerge. The TTAB noted that the Model Order limited the number of custodians and search terms for all e-mail production requests, and indicated that e-mail production requests should only be propounded for specific issues rather than general discovery of a product or business.

The TTAB also noted that it is well settled that the producing party is in "the best position to determine the method by which [it] will collect documents," at least "absent an agreement or timely objection." And a mere belief that documents must exist is not enough to grant a motion to compel. Accordingly, the TTAB found that in view of its limited jurisdiction, the narrowness of the issues to be decided by the TTAB, and the concerns expressed by the Federal Circuit, the burden and expense of e-discovery will weigh heavily against requiring production in most cases. The TTAB advised that parties should be precise in their requests and have as their first consideration how to significantly limit the expense of such production. Absent such a showing, the likelihood of success of any motion to compel will be in question. Thus, the TTAB denied Applicant's motion to compel to the extent that Applicant requested that Opposer be required to start its production over, using the same or similar protocols to those Applicant used. The TTAB concluded that Applicant had failed to establish that Opposer's method of searching and producing documents was insufficient as a general matter, given the parties' failure to agree on an ESI discovery protocol in advance, the nature of Applicant's discovery requests, and the issues in this proceeding.

The TTAB next turned to the question of whether Opposer adequately responded to the specific document requests at issue. The TTAB noted that the case concerned only whether Applicant's mark was generic or merely descriptive, and that while Opposer may possess e-mails and internal nonpublic documents that are relevant to these issues, the question is whether the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii). The TTAB indicated that Applicant had not argued that Opposer's responses to any of Applicant's first set of

document requests were inadequate (other than Opposer's alleged failure to engage in appropriately extensive ESI discovery as a general matter). Accordingly, the TTAB focused only on the second set of responses.

After examining those requests and Opposer's responses, the TTAB found that certain of Opposer's responses were inadequate. Accordingly, the TTAB granted Applicant's motion in part with respect to those specific requests and ordered Opposer to produce representative samples of responsive documents in Opposer's possession, custody, or control, including responsive ESI, as necessary and appropriate. Additionally, Opposer was ordered to ensure that it work with, and search for documents maintained by, the appropriate employees and/or custodians. The TTAB denied Applicant's motion to compel, however, as to Opposer's ESI generally.

CONCLUSION

In its first substantive decision addressing e-discovery in TTAB cases, the TTAB found that because of its limited jurisdiction, the narrowness of the issues to be decided by the TTAB, and the concerns expressed by the Federal Circuit regarding the time and costs associated with disproportionate and overbroad e-discovery production requests, the burden and expense of e-discovery "will weigh heavily against requiring production in most cases." Accordingly, in deciding a motion to compel ESI, the TTAB will look at, among other things, whether the movant's requests were precise and whether the movant considered how to significantly limit the expense of such production.

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Unregistrable

Clai®voyant

by Robert D. Litowitz

2011 was a year I'd sooner forget. Not much good happened in the first year of the second decade of the third millennium, aside from Osama Bin Laden's departure after diabolically sequestering himself where nobody would ever think to look—in plain sight. In the United States, the job market continued to founder, politicians continued to gird for gridlock, Occupy Wall Street protesters in Berkeley were doused with pepper spray as if they were weeds, *Jersey Shore* remained on TV, the St. Louis Cardinals lost Albert Pujols to the big-market L.A. Angels, and Herman Cain discovered that running for president is far more complex than delivering pizza. (When he left the race for the Republican nomination, the leader of Ubeki-beki-beki-beki-stan-stan breathed a sigh of relief).

Across the Atlantic, things were hardly rosier. Greece hovered on the brink of an economic catastrophe that threatened to engulf the entire planet; Italy's flamboyant and notorious leader, Silvio Berlusconi, finally ran out of luck and was driven from office after years of scandals; France had its own controversies, with the head of the IMF fleeing New York in disgrace and a former president convicted of corruption; and Germany failed for the 500th consecutive year to produce even a single trace of humor. (*Springtime for Hitler* does not qualify, having been written in America by Mel Brooks.)

In the Middle East, the Arab Spring began to turn cold as the ouster of Hosni Mubarak failed to bring about rapid democratic reforms, Syria's repressive regime continued to defy the will of the people and basic human rights, Iran continued to flirt with a dangerous nuclear agenda, the Israeli/Palestinian conundrum appeared no closer to resolution, and the entire region continued to suffer the embarrassment and shame of having allowed *Sex and the City 2* to be filmed on location in Abu Dhabi.

In Asia, things were worse. Japan was struck by a tsunami, causing a nuclear crisis that made Three Mile Island seem like a breezy week of fun. At the Fukushima nuclear power plant, flood waters crippled the reactors, sparked fears of another Chernobyl, and added fuel to the worldwide economic meltdown. Not even Homer Simpson could undo the damage. China, on the other hand, continued to fuel its engine of economic growth, thanks in no small measure to a not-so-healthy disregard of U.S. intellectual property rights. And speaking of piracy, that age-old scabrous profession seemed alive and well, not merely in Johnny Depp's Keith-Richard inspired performance in the Disney film franchise, but also on the high seas off Somalia, where neither commercial shipping nor small private sail boats were safe from these lawless predators. But at least piracy was one domain that remained free from interference by Donald Trump.

So what's in store for us in 2012? For intellectual property fans, the new America Invents Act will take wing and may revolutionize patent law as we know it. For political junkies, the Republican primaries should provide thrills, chills, and spills, leading to a robust campaign for the presidency between Barack Obama and the Last Man or Woman Standing, be it Mitt, Newt, Ron, Rick P, Rick S, or a player to be named later. The outcome of that race is likely to turn on debates sponsored by The Commission on

Presidential Debates®. Social and economic activists will get to see the mettle of the Occupy Wall Street movement. Will the hordes of disgruntled 99%-ers who for months have railed against social and economic inequality, high unemployment, greed, as well as corruption, and the undue influence of corporations be dispersed by the cold of winter, the threat of arrest, or the yen for a good caffe latte at Starbucks®? Will sports fans get to see another championship season by Aaron Rogers and the Green Bay Packers, or will the Pack's quest for a repeat be derailed by injury, poor officiating, or the inability to resume play after a mesmerizing performance by Madonna at the Bridgestone® Super Bowl halftime extravaganza? Whoever said trademarks and brand owners don't have the power to change the world?

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