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Recent Development

RECENT DEVELOPMENTS IN TRADEMARK LAW

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This article reviews a selection of trademark and unfair competition decisions reported in the United States Patents Quarterly, Second Series, Vol. 29, No. 7 (Feb. 14, 1994) through Vol. 31, No. 9 (Aug. 29, 1994).

I. Trade Dress

A. Inherent Distinctiveness

In *Stuart Hall Co. v. Ampad Corp.*,¹ the district court put a new twist on the difficult issue of defining an “inherently distinctive” trade dress:

In order to be inherently distinctive in a manner to serve as a source-identifier, it seems evident that a trade dress must have sufficient strength of visual impact to impress itself on the mind of a consumer, and thus be subject to recall when the consumer next enters the market. The trade dress must thus be *striking* in appearance, or at least *memorable*.²

The trade dresses at issue in this case consisted of various features of note pads, including their tear-off covers, permanent covers, and inside page layouts. The court denied the plaintiff’s motion for a preliminary injunction, holding that its trade

dress was “eminently forgettable rather than *48 memorable.”³ Although there was evidence that the defendant copied the layout of the plaintiff’s inside page, the court found that the layout was extremely weak in its mental impact and had a routine appearance. Thus, the court found that the page layout was not “intentionally designed to identify the source of the product”, but rather simply “to supply a practical, nice-appearing inside page.”⁴

The court acknowledged that other courts have seldom if ever used the terminology “striking” or “memorable” in defining an inherently distinctive trade dress. However, the court defended this definition as being consistent with the requirement that a protectable mark or trade dress be “recognizable as an indicium of source, rather than a decorative symbol or pattern.”⁵ The court reasoned, “To surpass merely decorative or aesthetically pleasing features and become a source identifier, a trade dress must be striking and memorable.”⁶ In a footnote, the judge offered as appearances he personally finds striking and memorable, “Durante’s nose, Holmes’ mustache, Chief Judge Arnold’s bow ties and Congressman Leach’s sweaters.”⁷

B. Remedies

The Seventh Circuit addressed various forms of remedies available under the Lanham Act in a recent trade dress infringement case styled *Badger Meter, Inc. v. Grinnell Corp.*⁸

The case involved competitors in the field of small water meters. The plaintiff was one of the four leading manufacturers of such products. The defendant copied one of the plaintiff’s meters, with two minor changes, prompting the plaintiff to file suit for trade dress infringement. The jury found that the trade dress of the plaintiff’s meter was inherently distinctive, had acquired secondary meaning, and was not functional. The jury also found that the defendant’s meter created a likelihood of confusion.

The Seventh Circuit affirmed on the liability issues, and then turned to the remedies awarded and denied by the district court. The plaintiff complained about the narrowness of the injunction entered because it was limited to various specific elements of the trade dress that the plaintiff claimed the defendant had infringed. The Seventh Circuit affirmed, stating that it “is loath to protect the clearly functional aspects of a product.”⁹ The Court declined to extend protection to internal parts of plaintiff’s product, suggesting that the proper method of protecting such parts is by patent.

The plaintiff also complained about the district court’s blessing of a modified design proposed by the defendant because it did not avoid all possibility of confusion. The Seventh Circuit affirmed, refusing to adopt a rule placing a prior infringer under a more stringent duty to *49 avoid infringement. The court explained that while a district court has discretion to require an infringer to utilize a new trade dress that does not even arguably infringe, so that the court will not have to expend scarce judicial resources examining each proposal in detail, it is not required to do so as a matter of law.¹⁰

The court then turned to monetary remedies. It noted that 15 U.S.C. § 1117(a) provides a plaintiff with three methods for calculating its recovery. The “standard method”¹¹ allows the plaintiff to recover any damages it suffered and requires the defendant to disgorge any profits it gained from the infringement. However, “[b]ecause it is often difficult to demonstrate a causal connection between the infringement and the defendant’s profits, and because plaintiffs’ damages are notoriously difficult to prove, Section 1117(a) provides two other methods which the court can utilize separately or in combination to approximate a fair recovery for the plaintiff.”¹²

The “first discretionary method”¹³ allows the court to award up to three times the plaintiff’s damages. This requires that the plaintiff be able to prove some damages.

The “second discretionary method”¹⁴ is to award the plaintiff “such sum as the court shall find to be just, according to the circumstances of the case,” premised on a finding that “recovery based on profits is either inadequate or excessive.”¹⁵ “This method obviously does not require the plaintiff to prove that it suffered any damages”¹⁶, the court noted. Rather, the method “is premised on unjust enrichment to the defendant.”¹⁷

Reconciling these two discretionary methods with Section 1117(a)’s requirement that any recovery “constitute compensation and not a penalty,” the court stated:

Under the first discretionary method the plaintiff’s provable damages are the benchmark for determining whether an award constitutes compensation or whether it is a penalty. Under the second discretionary method the benchmark for making this determination is the likely benefit accruing to the defendant on account of its infringement.¹⁸

Finally, the Seventh Circuit affirmed the district court’s refusal to award attorney fees to the plaintiff, despite the defendant’s

intentional copying. Although it was clear that the defendant purposely copied the plaintiff's water meter, the court found that much of the copying was within the defendant's rights as a competitor. The court found that the admittedly legal process of copying unpatented functional meter characteristics does not support a finding that the case is exceptional, which typically requires "truly egregious, purposeful infringement, or other purposeful *50 wrongdoing."¹⁹ The court refused to equate defendant's deliberately copying plaintiff's product to deliberately infringing its trade dress.

II. Reverse Confusion

In *Fisons Horticulture, Inc. v. Vigoro Industries, Inc.*,²⁰ the Third Circuit for the first time squarely adopted the doctrine of reverse confusion as an actionable form of trademark infringement.

The plaintiff was a Canadian company who owned an incontestable federal registration of the mark FAIRWAY for peat moss.²¹ The defendant was a prominent manufacturer of fertilizer who had recently begun using the mark FAIRWAY GREEN for an upscale consumer line of premium-quality fertilizers.²² The district court found that confusion was not likely.²³ The Third Circuit reversed and remanded, holding that the district court misapplied some of the factors relevant to likelihood of confusion, and failed to consider others.

Defining reverse confusion as occurring "when a larger, more powerful company uses the trademark of a smaller, less powerful senior owner and thereby causes likely confusion as to the source of the senior user's goods or services,"²⁴ the court stated "Without the recognition of reverse confusion, smaller senior users would have little protection against larger, more powerful companies who want to use identical or confusingly similar trademarks."²⁵

The court then analyzed the traditional likelihood of confusion factors in the context of a reverse confusion case. The court noted that "while evidence of actual confusion strengthens the plaintiff's case, it is not essential."²⁶ When parties have used similar marks for a sufficient period of time without evidence of consumer confusion, there is an inference that future consumers will not be confused either. However, where the products at issue represent a small investment to the consumer and are not likely to malfunction, actual confusion may not manifest itself to the manufacturers.²⁷

The court stated that the "degree of similarity of the marks may be the most important of the ten factors" in the likelihood of confusion analysis.²⁸ The court approved a rule that where, as here, the junior user appropriates the senior user's entire mark (FAIRWAY) and adds descriptive matter (GREEN) to it, the overall impression of two marks is essentially the same.²⁹

*51 As for the strength of the mark, the court found that the plaintiff's mark was strong on the scale of distinctiveness (since it ranked between arbitrary and suggestive), but that it was commercially weak. The court held, however, that the district court erred in giving considerable weight to the absence of commercial strength because this was a case of reverse confusion, not forward confusion. In reverse confusion cases, the senior user's mark "is typically weaker commercially than that of the junior user."³⁰

The Third Circuit also criticized the district court's treatment of the defendant's intent as misplaced in a case of reverse confusion. The district court found no evidence that the defendant attempted to benefit from the goodwill developed by plaintiff in its FAIRWAY mark. The Third Circuit held that while this inquiry is appropriate to cases of forward confusion, it is not for reverse confusion. In reverse confusion cases, the junior user does not seek to trade on the senior user's good will--instead, he overwhelms it.³¹ In such cases, the court should analyze whether the defendant was "careless in its evaluation of the likelihood of confusion."³²

As for product expansion, the court stated that in reverse confusion cases, the court should not only look at facts suggesting that the consuming public might expect the prior user to manufacture a product in the defendant's market, but also vice-versa. "In a case of reverse confusion, [the court] may also consider facts suggesting the consuming public might expect the junior owner to manufacture a product in the senior user's market."³³

Also relevant are the plaintiff's plans to expand into the defendant's market. The court explained:

One of the chief reasons for granting a trademark owner protection in a market not his own is to protect his right someday to enter that market. When it appears extremely likely . . . that the trademark owner will soon enter the defendant's field, this. . . factor weighs heavily in favor of injunctive relief. . . . If there is evidence of expansion, but it is less strong, it will weigh less heavily in plaintiff's favor.³⁴

Finally, as for the relationship of the goods, the court stated that the relevant question in this case of reverse confusion is “whether a consumer who bought or saw the advertising for Fairway Green fertilizer could reasonably assume that the same source also offered the Fairway peat moss it saw in the stores.”³⁵

III. Parody

Unamused by a parody of Michelob beer, the Eighth Circuit in *Anheuser-Busch, Inc. v. Balducci Publications*³⁶ enjoined a magazine publisher’s mock advertisement for a make-believe product called “MICHELOB OILY.”

***52** The ad in question stated “ONE TASTE AND YOU’LL DRINK IT OILY,” and featured a can of Michelob Dry pouring oil onto a fish, an oil-soaked rendition of Anheuser-Busch’s eagle design (with the eagle exclaiming “yuck!”) below a Shell Oil symbol and various “Michelob Oily” products resembling Anheuser-Busch’s family of Michelob products. The ad appeared on the back cover of *Snicker*, a humor magazine published by the defendant.

The defendant defended the ad as a parody to comment on the effects of environmental pollution, including the Shell Oil spill in the Gasconade River, a source of Anheuser-Busch’s water supply. The district court entered judgment for the defendant, finding that Anheuser-Busch failed to establish any likelihood of confusion.³⁷ In reaching that decision, the district court expressed the need to give special sensitivity to the First Amendment aspects of the case.³⁸

The Eighth Circuit reversed holding that the district court improperly conflated the issues of likelihood of confusion and First Amendment protection, which are two related but distinct steps.³⁹ The appellate court found confusion likely under all of the applicable factors, particularly the strength of Anheuser-Busch marks, the similarity of the marks in the defendant’s ad, and survey evidence showing actual confusion. Over half of those surveyed thought the defendant needed Anheuser-Busch’s approval to publish the ad, and 6% thought the parody was an actual Anheuser-Busch ad.⁴⁰ The court concluded that the survey strongly indicated actual consumer confusion. The court also held that the ad violated the Missouri anti-dilution statute,⁴¹ since the majority of those surveyed construed the parody as suggesting that Michelob beer contained oil, and thus the ad tarnished the image of Anheuser-Busch’s marks.⁴²

Turning to the First Amendment, the court rejected the defendant’s argument that he had an absolute right to use Anheuser-Busch’s trademarks in a parody appearing in a magazine.⁴³ The court held that the First Amendment did not protect the defendant’s ad here because the confusion created by the ad was wholly unnecessary to achieve the defendant’s stated purpose: to comment on environmental pollution and Anheuser-Busch’s brand proliferation.⁴⁴ The defendant could have used a more obvious disclaimer, positioned the parody in a less-confusing location in the magazine (since the back cover is often used for real ads), and altered Anheuser-Busch’s marks in a meaningful way to minimize the risk of confusion and still convey the intended message.⁴⁵

***53** IV. Registrability

A. Disparaging Marks

In a split decision styled *In re Hines*,⁴⁶ the TTAB upheld an examiner’s refusal to register a mark under Section 2(a) of the Lanham Act,⁴⁷ on the ground that the mark disparages or brings into dispute the religion of Buddhism.⁴⁸

The mark at issue consisted of a drawing of Gautama Buddha, the founder of Buddhism, wearing a bathing suit with the words BUDDA BEACHWEAR underneath the figure.⁴⁹ The examiner found that depicting Buddha in such a casual manner gave him “hedonistic qualities” and thus disparaged Buddhism, which “emphasizes right views, conduct and concentration.”⁵⁰ The applicant appealed, arguing (among other things) that the examiner’s decision was “totally arbitrary and capricious,” since the examiner presented no evidence that Buddhists were prohibited from wearing casual attire or that anyone would be shocked by a depiction of Buddha in bathing attire.⁵¹

The TTAB prefaced its decision by acknowledging the “somewhat vague” guidelines and “highly subjective” nature of determining whether a mark is scandalous or disparaging, as well as its own lack of expertise on the subject of Buddhism:⁵² “We concede that we are not, nor do we pretend to be, experts on Buddha or Buddhism. Be that as it may, we are charged with the duty of determining the Federal registrability of applicant’s mark.”⁵³

After reviewing various literary discussions about the Buddhist doctrine and the image of Buddha, the TTAB held that the mark at issue was disparaging.⁵⁴ The image of Buddha is a subject of respect, reverence, and devotion in the Buddhism

religion. Pictorializing Buddha in casual wear slight, undervalues, discredits, or cheapens him and the image to which Buddhists pay devotion.⁵⁵

Administrative Trademark Judge Hanak dissented, pointing out that the Patent and Trademark Office has issued at least five registrations of marks containing the word “Buddha” to third parties, two of which included a depiction of Buddha.⁵⁶ Based on the record, Judge Hanak could not discern how it could be said that, without a doubt, the applicant’s mark here was disparaging while the figures in the third-party registrations were not. Judge Hanak would have passed the mark to publication with the knowledge that if a group finds it to be scandalous or *54 disparaging, an opposition proceeding could be brought and a more complete record could be established.⁵⁷

B. Disclaimers

In *In re K-T Zoe Furniture, Inc.*,⁵⁸ the Federal Circuit held that the mark THE SOFA & CHAIR COMPANY in a stylized form for “custom manufacturing of furniture upholstered with fabrics furnished or pre-selected by customers” was not registrable without a disclaimer of all of the words in the mark.⁵⁹

In this case, the TTAB refused registration of the mark unless the applicant disclaimed the phrase “the sofa & chair company.” The TTAB found that those words, while not generic for the applicant’s services, were “apt (common) descriptive.”⁶⁰

The Federal Circuit affirmed. The court agreed that the words “the sofa & chair company” are not generic for the applicant’s services. However, they are strongly descriptive and have not been shown to have acquired secondary meaning. Thus, the words alone are not independently registrable.⁶¹ Noting that the Commissioner is authorized to require disclaimer of “an unregistrable component” of a mark,⁶² the court stated:

When the mark is a typographical design, “it is entirely possible to disclaim all the [word or letter] components of such a design mark. . . and still have a registrable whole”. . . However, the registration may be limited to the stylized form of otherwise unregistrable words.

The purpose of the disclaimer practice is to enable, not to bar, registration. Although occasionally criticized, . . . the practice can facilitate the commercial purposes of the trademark law, by enabling registration of a distinctive style of displaying words when the words themselves are not registrable. . . However, a distinctive configuration of words does not of itself impart registrability to the words standing alone.⁶³

V. False Advertising

A. Intent To Mislead; Surveys

In *Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Rhone-Poulenc Rorer Pharmaceuticals Inc.*,⁶⁴ the Third Circuit held that an intent by the defendant to mislead the public, standing alone, is insufficient to shift the burden of proof to the defendant on whether an *55 advertisement is misleading in violation of Section 43(a) of the Lanham Act⁶⁵; deliberate conduct of an egregious nature is also required.⁶⁶

The defendant claimed in its television commercials that its antacid product, Extra Strength Maalox Plus, was “the strongest antacid there is.”⁶⁷ The court found that these claims were intended to convey a misleading message of superior relief.⁶⁸ However, the court excused the defendant’s conduct, finding that such advertising statements are unfortunately common in the antacid industry and do not rise to the egregious proportions warranting a presumption shifting the burden of proof.⁶⁹

Turning to survey evidence, the court held that it was not an abuse of its discretion for the district court to find that the plaintiff’s surveys did not show that a substantial number of consumers were misled into thinking that the defendant’s product provides superior relief.⁷⁰ The district court criticized certain questions in the plaintiff’s survey as leading. These questions pointed out to the survey participants that the defendant’s commercial says that Maalox tablets are the strongest, and asked them what that means, and what the commercial says Maalox tablets are the strongest at doing.⁷¹ The court stated that “a survey is not credible if it relies on leading questions which are inherently suggestive and invite guessing by those who did not get any clear message at all.”⁷² The court affirmed the district court’s judgment in favor of the defendant.

Judge Alito dissented, pointing out that approximately 90% of those surveyed, when asked what they thought defendant’s ads

said that Maalox is strongest at doing, responded that they interpreted the ads to mean that Maalox is strongest at giving relief.⁷³ He stated that in his opinion, a Section 43(a) plaintiff should only have to show that a misleading statement in an ad would be misinterpreted by a substantial portion of those who pay attention to the statement and attach some meaning to it, not a substantial portion of all who are exposed to the statement including those who do not pay attention to it.⁷⁴ The judge indicated that the survey questions criticized by the majority only lead the person responding to pay attention to and interpret the statement, not to adopt any particular interpretation of the statement.⁷⁵ He concluded that a striking percentage of those who interpreted the defendant's ad when asked to do so were misled, just as the defendant intended.⁷⁶

*56 B. Product Compatibility Claims

In *Anton/Bauer Inc. v. Energex Sys. Corp.*,⁷⁷ the court preliminarily enjoined the defendant's marketing of rebuilt battery cell packs as being fully compatible with the plaintiff's lighting systems.⁷⁸

The plaintiff was a manufacturer of systems which provide light to television camera crews. The systems included battery cells and a monitoring system for the battery cells. The defendant rebuilt used battery cells made by the plaintiff and sold them to customers of plaintiff's lighting systems as replacement cell packs. Many of these rebuilt packs contained the plaintiff's trademarks.

The court noted that resale of a trademarked product without permission of the trademark owner is not prohibited by the trademark law. However, "misleading statements concerning product similarity or compatibility are prohibited by both trademark law and numerous antideception provisions including Section 43(a) of the Lanham Act."⁷⁹ The court found that the defendant was not only using the plaintiff's marks without permission, but also erroneously suggesting to customers that defendant's products would predictably or necessarily function as a fully equivalent replacement for those of the plaintiff, which the defendant had failed to assure.⁸⁰

Footnotes

^{a1} Arnold, White & Durkee, Austin, Texas.

¹ 31 U.S.P.Q.2d (BNA) 1468 (W.D. Mo. 1994).

² *Stuart Hall Co.* at 1470 (emphasis in original).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 1471, (citing 3 *CALLMANN UNFAIR COMPETITION* § 18.01, at 2 (4th ed. 1988)).

⁶ *Id.* at 1471.

⁷ *Id.* at 1470 n.1.

⁸ 13 F.3d at 1145, 29 U.S.P.Q.2d (BNA) 1507 (7th Cir. 1994).

⁹ *Badger Meter*, 13 F.3d at 1154, 29 U.S.P.Q.2d at 1514.

¹⁰ 13 F.3d at 1157, 29 U.S.P.Q.2d at 1516.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 15 U.S.C. § 1117(a) (1994).

16 *Badger Meter*, 13 F.3d at 1157, 29 U.S.P.Q.2d at 1516.

17 *Id.*

18 *Id.*

19 *Badger Meter*, 13 F.3d at 1159, 29 U.S.P.Q.2d at 1518.

20 30 F.3d 466, 31 U.S.P.Q.2d (BNA) 1592 (3d Cir. 1994).

21 *Fisons Horticulture*, 30 F.3d at 466, 31 U.S.P.Q.2d at 1593.

22 30 F.3d at 470, 31 U.S.P.Q.2d at 1593.

23 30 F.3d at 475, 31 U.S.P.Q.2d at 1603.

24 30 F.3d at 474, 31 U.S.P.Q.2d at 1598.

25 *Id.*

26 30 F.3d at 476, 31 U.S.P.Q.2d at 1599.

27 *Id.*

28 30 F.3d at 476, 31 U.S.P.Q.2d at 1600.

29 30 F.3d at 477, 31 U.S.P.Q.2d at 1600.

30 30 F.3d at 479, 31 U.S.P.Q.2d at 1602.

31 *Id.*

³² 30 F.3d at 479, 31 U.S.P.Q.2d at 1603.

³³ *Id.*

³⁴ 30 F.3d at 480, 31 U.S.P.Q.2d at 1603 (citation omitted).

³⁵ 30 F.3d at 481, 31 U.S.P.Q.2d at 1604.

³⁶ 28 F.3d at 769, 31 U.S.P.Q.2d (BNA) 1296 (8th Cir. 1994).

³⁷ Anheuser-Busch, Inc. v. Balducci Publications, 814 F. Supp. 791, 797 (E.D. Mo. 1993).

³⁸ *Id.* at 796-797.

³⁹ *Anheuser-Busch*, 28 F.3d at 773, 31 U.S.P.Q.2d at 1299.

⁴⁰ 28 F.3d at 774-75, 31 U.S.P.Q.2d at 1299-1300.

⁴¹ Mo. Rev. Stat. § 417.061 (1973).

⁴² *Anheuser-Busch*, 28 F.3d at 777, 31 U.S.P.Q.2d at 1302.

⁴³ 28 F.3d at 778, 31 U.S.P.Q.2d at 1303.

⁴⁴ 28 F.3d at 776, 31 U.S.P.Q.2d at 1301.

⁴⁵ *Id.*

⁴⁶ 31 U.S.P.Q.2d (BNA) 1685 (TTAB 1994).

⁴⁷ 15 U.S.C. § 1052(a) (1994).

⁴⁸ *In re Hines*, 31 U.S.P.Q.2d at 1691.

⁴⁹ The application covered T-shirts, sweatshirts, shorts and hats.

⁵⁰ *In re Hines*, 31 U.S.P.Q.2d at 1687.

⁵¹ *Id.* at 1686.

⁵² *Id.* at 1687.

⁵³ *Id.* at 1688.

⁵⁴ *Id.*

⁵⁵ *Id.* at 1688-89.

⁵⁶ *Id.* at 1692.

⁵⁷ *Id.*

⁵⁸ *K-T Zoe Furniture*, 16 F.3d 390, 29 U.S.P.Q.2d 1787 (Fed. Cir. 1994).

⁵⁹ 16 F.3d at 394, 29 U.S.P.Q.2d 1789.

⁶⁰ 16 F.3d at 392, 29 U.S.P.Q.2d 1788.

⁶¹ 16 F.3d at 394, 29 U.S.P.Q.2d 1789.

⁶² 15 U.S.C. § 1056(a) (1994).

⁶³ *K-T Zoe Furniture*, 16 F.3d at 394, 29 U.S.P.Q.2d at 1789 (citations omitted).

⁶⁴ 19 F.3d at 125, 30 U.S.P.Q.2d 1112 (3d Cir. 1994).

⁶⁵ 15 U.S.C. § 1125(a) (1994).

⁶⁶ *Johnson & Johnson-Merck*, 19 F.3d at 132, 30 U.S.P.Q.2d at 1118.

⁶⁷ 19 F.3d at 126, 30 U.S.P.Q.2d at 1113.

⁶⁸ 19 F.3d at 131, 30 U.S.P.Q.2d at 1117.

⁶⁹ 19 F.3d at 132, 30 U.S.P.Q.2d at 1118.

⁷⁰ 19 F.3d at 136, 30 U.S.P.Q.2d at 1121.

⁷¹ 19 F.3d at 133-34, 30 U.S.P.Q.2d at 1119.

⁷² 19 F.3d at 134, 30 U.S.P.Q.2d at 1120 (citation omitted).

⁷³ 19 F.3d at 136-37, 30 U.S.P.Q.2d at 1122.

⁷⁴ 19 F.3d at 137, 30 U.S.P.Q.2d at 1123.

⁷⁵ 19 F.3d at 137, 30 U.S.P.Q.2d at 1123.

⁷⁶ 19 F.3d at 137, 30 U.S.P.Q.2d at 1122.

⁷⁷ 31 U.S.P.Q.2d 1363 (S.D.N.Y. 1993).

⁷⁸ *Anton/Bauer*, 839 F.Supp at 247, 31 U.S.P.Q.2d at 1365.

⁷⁹ 15 U.S.C. § 1125(a) (1994); *Anton/Bauer*, 839 F.Supp at 245, 31 U.S.P.Q.2d at 1364.

⁸⁰ *Id.*