

A Winthrop & Weinstine blog dedicated to bridging the gap between legal & marketing types.

[Post-Sale Initial Interest Trademark Confusion?](#)

Posted on March 24, 2011 by [Steve Baird](#)



Two of the above magazine titles were displayed on the coffee table of the condo that we rented over our recent spring break vacation (the first and third from the left).

My first reaction was, good grief, [The Oprah](#) "owns" coffee table tops in Grand Cayman too! My family members also wondered about a possible connection between Oprah and the "complimentary" magazine, given the close similarity in trade dress (my word, not theirs), so, either I'm not crazy or I've made my family crazy. Just so you know, [I haven't ruled out](#) the latter possibility.

A closer inspection of the [InsideOut](#) magazine, however, revealed no apparent connection with Oprah, as it is published by [CaymanFreePress](#) with the tagline "[Cayman's Home & Living Magazine](#)". Nevertheless, it seems hard to argue the trade dress and logo weren't inspired by O and the look and feel of her magazine covers.

It got me thinking a bit about [initial interest confusion](#) and [post-sale trademark confusion](#), and the distaste my learned friend Ron Coleman has for at least the initial interest trademark confusion theory, as you may recall from some previous posts concerning the Coca-Cola brand ([mine](#) and his [response](#)). So, what do we have here?

Since the InsideOut magazine is not available for sale, but apparently only made available to the guests of rental properties on the island, any confusion is probably of the post-sale variety, right?



If so, I must ask, do you suppose it is possible to have something like initial interest confusion in a post-sale context, or is the fact that confusion abates upon closer inspection simply a sign that there is no actionable confusion in the first place?

In fairness, I should disclose that I probably stacked the deck a bit with the image selection above, since Oprah's "O at Home" magazine apparently [ceased publication](#) a couple of years ago, and O magazine appears to prominently feature an image of Oprah Winfrey on the cover of each issue (a trade dress element clearly absent from the InsideOut magazine from the Cayman Islands):



Here's another question worth asking: Does the fact that a prominent photograph of Oprah appears on each cover of O magazine form a key ingredient of the magazine's trade dress and thus limit the scope of rights she can assert against other magazines like InsideOut?

I'd probably suggest mixing it up a bit, at least for that reason, but, even having said that, I have a strong sense that Oprah has a very good idea of what actually sells her magazine . . . me O my.



Capella Tower | Suite 3500 | 225 South Sixth Street | Minneapolis, MN 55402
Main: (612) 604-6400 | Fax: (612) 604-6800 | www.winthrop.com | A Professional Association