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May 2010 Issue

Civil Cases

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by Dana M. Nicoletti

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Civil Cases

V Secret Catalogue, Inc. v. Moseley, 2010 WL 1979429 (6th Cir. May 19, 2010)

*by Dana M. Nicoletti **

ABSTRACT

The Court of Appeals for the Sixth Circuit affirmed the permanent injunction against defendants' use of the name "Victor's Little Secret" for their sex toys and apparel shop. The Sixth Circuit explained that under the Trademark Dilution Revision Act of 2006, which was intended expressly to overrule the Supreme Court's decision in this same case, defendants did not rebut plaintiff Victoria's Secret's dilution−by−tarnishment claim. The Sixth Circuit held that a potentially dilutive mark used to sell sex−related products creates a strong inference of dilution by tarnishment of a famous mark.

CASE SUMMARY

FACTS

In 1998, plaintiff V Secret Catalogue ("Victoria's Secret"), owner of the VICTORIA'S SECRET trademark and hundreds of Victoria's Secret stores nationwide, objected to defendants Victor and Cathy Moseley's ("the Moseleys") operation of a lingerie and adult novelty store called "Victor's Secret" in Elizabethtown, Kentucky. The store was brought to Victoria's Secret's attention by an army colonel stationed at Fort Knox, Kentucky, who saw an advertisement for the store and was personally offended by what he perceived as an attempt to "use a reputable company's trademark to promote the sale of 'unwholesome, tawdry merchandise.'" In response to a demand letter from Victoria's Secret's counsel, the Moseleys changed the name of their store to "Victor's Little Secret."

Victoria's Secret responded by filing suit, claiming that the new name infringed its famous VICTORIA'S SECRET trademark and diluted it by blurring its distinctiveness and tarnishing its reputation by linking it to unsavory adult themes. The U.S. District Court for the Western District of Kentucky had granted Victoria's Secret's motion for summary judgment on its dilution claim, and the Sixth Circuit affirmed in 2001, holding that "consumers who hear the name 'Victor's Little Secret' are likely automatically to think of the more famous store and link it to the Moseleys' adult−toy, gag gift, and lingerie shop." In 2003, the Moseleys appealed the case to the Supreme Court, which reversed the injunction because Victoria's Secret did not prove actual dilution by tarnishment. According to the Supreme Court, under the federal dilution law then in effect, Victoria's Secret had to show an actual "lessening of the capacity of the VICTORIA'S SECRET mark to identify and distinguish goods sold in Victoria's Secret stores or advertised in its catalogs."

In response to the Supreme Court's decision, Congress revised the federal anti−dilution provisions. The Trademark Dilution Revision Act of 2006 ("TDRA") was expressly intended to overrule the Supreme Court's "actual harm" standard for dilution, which Congress deemed "an undue burden for trademark holders who contest diluting users." The new language in the TDRA provided that the standard for proving a dilution claim is now a "likelihood of dilution" and that both dilution by blurring and dilution by tarnishment are actionable claims. On remand from the Supreme Court after the 2003 reversal, the district court reconsidered the case based on the new dilution standard in the TDRA. The Moseleys did not introduce any evidence to disprove a probability of tarnishment, and so the district court concluded that the connection between the "Victor's Little Secret" mark and the sexual goods sold under it disparaged and reduced the positive associations and selling power of the VICTORIA'S SECRET mark. The district court again issued a permanent injunction against the Moseleys' use of the name "Victor's Little Secret." The Moseleys renamed their store "Cathy's Little Secret" and appealed to the Sixth Circuit.

ANALYSIS

The Sixth Circuit affirmed the injunction against "Victor's Little Secret" and ruled that Congress's decision to pass the TDRA supported its finding of dilution by tarnishment. The court described the issue on appeal as whether the "Victor's Little Secret" name, with its association with lewd sex toys, creates a likelihood of dilution by tarnishment of the VICTORIA'S SECRET mark. According to the court, there is a "clearly emerging" consensus in trademark dilution case law that the creation of an association between a famous mark and "lewd or bawdy" sexual activity disparages and harms the famous mark and its commercial value. The court observed that at least eight federal cases in six jurisdictions have concluded that a famous mark is tarnished when it is semantically associated with a mark used to sell sex-related products or services, and this case should be no exception. The combined weight of this case law, legal treatises, and Congress's intent in the TDRA to reduce trademark owners' burden of proof in dilution cases compelled the Sixth Circuit's conclusion.

The court ruled that if a mark with a clear semantic association to a famous mark is used to sell sex−related products, there is "a kind of rebuttable presumption, or at least a very strong inference," that the mark is likely to tarnish the famous mark. This presumption or inference gives the owner of the new mark the burden of producing evidence that there is no likelihood or probability of tarnishment. In the present case, the Moseleys did not present any evidence to show the absence of a probability that "Victor's Little Secret" tarnishes VICTORIA'S SECRET. Without any evidence to the contrary, the court had no basis to reverse the district court's injunction.

The court rejected the Moseleys' arguments that they should have the right to use Victor Moseley's first name, and that the effect of the association with VICTORIA'S SECRET was de minimis. Rather, the Moseleys did not have the right to use the word "secret" in their mark, and only used it in order to create an association with VICTORIA'S SECRET. The court did note that the tarnishing effect of "Victor's Little Secret" was "somewhat speculative," but then stated that the TDRA was designed to protect trademarks from any unfavorable sexual associations. As such, any new mark with a lewd or "offensive-to-some" sexual association raises a strong inference of tarnishment. This inference must be overcome by evidence rebutting the likelihood that consumers will find the new mark offensive and harmful to the famous mark's reputation, and such evidence was absent here.

The Moseleys had also argued that the TDRA should not apply to them, because it is not retroactive.

The court rejected this argument noting that new statutes may be applied to pending cases where prospective relief is sought for *ongoing* conduct.

CONCLUSION

This decision underscores the "likelihood of dilution" standard set forth in the TDRA and affirms its application in the very case that led to the passage of the TDRA in the first place. The Sixth Circuit also sets forth what appears to be a new standard for dilution by tarnishment for famous marks associated with sexual products—if a mark with a clear semantic association to a famous mark is used to sell sex−related goods or services, there is a strong inference that the junior mark is likely to tarnish the famous mark. The owner of the new mark thus bears the burden of producing evidence that there is no probability of tarnishment to rebut the presumption of dilution.

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May 2010 Issue

Civil Cases

Au-Tomotive Gold Inc. v. Volkswagen of Am., Inc., 2010 WL 1794018 (9th Cir. May 6, 2010)

by Mary Beth Walker

ABSTRACT

The Ninth Circuit held that plaintiff's sale of marquee license plates–plain license plates to which defendant attached authentic Volkswagen badges–was not protected by the "first sale" doctrine. In analyzing plaintiff's first–sale defense, the Ninth Circuit found trademark infringement based on post–sale confusion. The court noted that its decision was not based on a likelihood of confusion among purchasers of the plates. Rather, its decision was based on the likelihood of post–purchase confusion among observers who see the plates on cars after the plates have been purchased.

CASE SUMMARY

FACTS

Au-Tomotive Gold, Inc. ("Auto Gold") sold marquee license plates bearing authentic Volkswagen badges purchased from Volkswagen of America, Inc. ("Volkswagen"). Auto Gold created the marquee license plates by altering "VW" badges ordinarily used as replacements for badges found on the hoods or trunks of Volkswagen vehicles and mounting them on plain license plates. The plates were then packaged with labels that explained that the plates were not produced or sponsored by Volkswagen.

Auto Gold originally filed suit seeking a declaratory judgment that its actions did not constitute trademark infringement. After an initial decision by the district court and a reversal and remand by the Ninth Circuit, the district court considered Auto Gold's defense that its sales of the marquee license plates were protected under the first-sale doctrine. The district court rejected this defense and granted summary judgment for Volkswagen.

ANALYSIS

The first–sale doctrine protects the seller of trademarked products in the resale of those products when consumers will not be confused as to the products' source or sponsorship. The Ninth Circuit noted that the first–sale doctrine has traditionally focused on the likelihood of confusion among purchasing consumers, and cases have recognized the principle that the right of a producer to control distribution of its trademarked product does not extend beyond the first sale of the product. In cases where a party incorporates the trademarked product of another into a new product, courts have generally found that the first–sale defense applies when the resulting new product is adequately marked to indicate its source and to avoid confusion among purchasing consumers. Thus, the application of the first–sale doctrine ultimately turns on the issue of likelihood of confusion.

The court also looked to post–sale confusion cases and noted that post–sale confusion could serve as the basis for trademark infringement regarding refurbished products. Although the post–sale cases on which the court relied did not address the first–sale doctrine specifically, “they establish[ed] that activities creating a likelihood of post–purchase confusion, even among non–purchasers, are not protected.”

Applying these related lines of cases, the court concluded that it was likely that a person on the street who sees an Auto Gold marquee license plate with a VW badge will associate the plate with Volkswagen. Indeed, the court reasoned that customers buy marquee license plates principally to demonstrate to the general public an association with Volkswagen. And the court found that Auto Gold’s disclaimer on the packaging of its marquee plates did nothing to dispel this post–purchase confusion.

Auto Gold argued that confusion among nonpurchasers is irrelevant in cases involving the first–sale defense. The court rejected this position, however, explaining that in each case where a court has applied the first–sale doctrine, the court either had good reason not to be concerned with post–purchase confusion or took steps to avoid addressing the issue.

Auto Gold also contended that in first–sale defense cases, the “element of ‘free-riding’ present in other post–purchase confusion cases disappears because the producer has paid the price asked by the trademark owner for the ‘ride.’” The court rejected this argument as well, reasoning that “[w]hen a producer purchases a trademarked product, that producer is not purchasing the trademark. Rather, the producer is purchasing a product that has been trademarked. If a producer profits from a trademark because of post–consumer confusion about the product’s origin, the producer is, to that degree, a free-rider.” The court concluded that “customers buy marquee license plates principally to demonstrate to the general public an association with Volkswagen.”

The court also rejected Auto Gold’s argument that there was no trademark infringement because its products were of high quality. The court noted that the central question is likelihood of confusion, not quality control. Additionally, the court held that the promotion of competition could not serve to defend Auto Gold’s infringing activity.

CONCLUSION

Generally, consumer confusion may be avoided in first-sale cases involving the incorporation of a trademarked product into a new product with a disclaimer or explanation provided at the point of sale of the resulting modified product. However, because such disclaimers are generally not seen by nonpurchasing observers of products post–sale, the likelihood of post–sale confusion may render the defense inapplicable in some cases.

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Civil Cases

College Network, Inc. v. Moore Educ. Publishers, Inc., 2010 WL 1923763 (5th Cir. May 12, 2010)

by David M. Kelly

ABSTRACT

Plaintiff sued defendant, a competitor in the study−guide market for nursing students, for trademark infringement based on defendant's purchase of "THE COLLEGE NETWORK" as a search−engine keyword to trigger sponsored−link advertising for its competing products. The jury found that defendant's actions did not cause a likelihood of consumer confusion and thus did not infringe the plaintiff's trademark. The Fifth Circuit agreed and affirmed the jury's verdict on appeal.

CASE SUMMARY

FACTS

The College Network, Inc. ("TCN") and Moore Educational Publishers, Inc. ("MEP") both published and sold study guides for nursing students. TCN sued MEP for trademark infringement based on MEP's purchase of "THE COLLEGE NETWORK" as a search−engine keyword to trigger sponsored−link advertisements for its competing products. MEP counterclaimed for defamation and tortious interference based on statements made by TCN's representative that MEP was "going out of business." At trial, TCN's expert witness opined that MEP's use of THE COLLEGE NETWORK as an Internet search keyword created a likelihood of confusion. Both parties moved for judgment as a matter of law at the close of evidence, but the district court judge denied the motions and sent the case to the jury for decision. To establish its claim for trademark infringement under the Lanham Act, TCN had to show that (1) it had a valid trademark in THE COLLEGE NETWORK; (2) MEP used the mark in commerce without TCN's permission; (3) MEP's use of the mark was likely to cause confusion; and (4) TCN sustained damage. The court's instructions to the jury assumed that the mark had been used in commerce and instructed the jury on the legal standards for determining the validity of the mark and whether there was a likelihood of confusion. The jury verdict form asked whether THE COLLEGE NETWORK was a valid trademark or name and, if so, whether MEP infringed it.

The jury found that TCN's mark was valid, but that it had not been infringed. The jury also awarded MEP damages on its tortious interference and defamation claims. After the jury rendered its verdict, TCN renewed its motion for judgment as a matter of law and requested, in the alternative, a new trial. TCN argued that the evidence at trial established a likelihood of confusion as a matter of law. MEP countered that, regardless of whether there was a likelihood of confusion, MEP's use of THE COLLEGE NETWORK as a search−engine keyword was not a use in commerce under the Lanham Act. This apparently was the first time either party questioned whether there was a use in commerce. The district court agreed with MEP, holding that MEP's use of the mark was not a use in commerce, and thus did not address TCN's argument regarding likelihood of confusion. TCN appealed.

ANALYSIS

The Fifth Circuit Court of Appeals affirmed the district court jury's verdict that MEP's use of THE COLLEGE NETWORK as a search−engine keyword was not trademark infringement. As an initial matter, the appeals court stated that it did not have to determine the correctness of the district court's conclusion that there was no use in commerce, because the evidence presented to the jury at trial did not compel a finding of likelihood of confusion under the Fifth Circuit's eight−factor likelihood−of−confusion test. At trial, MEP presented extensive documentary evidence on the issue, the jury was permitted to view the keyword search process and visually compare the two companies' websites, and TCN's own expert testified that there had not been any actual confusion. The Fifth Circuit held that the evidence presented at trial did not point so "strongly and overwhelmingly in favor" of TCN that a reasonable jury could not arrive at a contrary verdict, the test for overturning a jury's verdict.

Finally, the Fifth Circuit rejected TCN's argument that it should apply the so−called "Internet Trinity" likelihoodofconfusion test that the Ninth Circuit uses for Internet advertising cases. Under this alternative test, the three critical factors are the similarity of the marks, the relatedness of the goods or services, and the parties' simultaneous use of the Internet as a marketing channel. If these three factors suggest that confusion is likely, the remaining factors must "weigh strongly" against a likelihood of confusion to avoid infringement. The Fifth Circuit refused to apply the "Internet Trinity" test because it had not adopted the Ninth Circuit test. Moreover, TCN did not object to the jury instructions on likelihood of confusion using the applicable Fifth Circuit test and thus waived any argument that the Ninth Circuit test should have been applied.

CONCLUSION

This decision is of interest because it is one of the few cases in which the question of trademark infringement based on Internet keyword−advertising was decided by a jury instead of a judge. However, the decision did not describe the content of the objectionable sponsored−link advertisements, particularly whether the ads contained TCN's mark and how MEP's marks were displayed, if at all. Thus, it is not clear whether this case involved the hot topic of whether keyword−triggered ads are actionable under the theory of initial−interest confusion even if they do not contain the plaintiff's mark.

May 2010 Issue

Civil Cases

Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP, 2010 WL 1744635 (Cal. Ct. App. May 3, 2010)

by Scott T. Harlan

ABSTRACT

The California Superior Court had entered judgment against Franklin Mint on its malicious prosecution claim against Manatt, Phelps & Phillips, LLP, finding that the law firm had probable cause to assert its client's federal trademark dilution and false advertising claims in a 1998 federal lawsuit. The California Court of Appeal reversed, however, finding that no reasonable attorney would think either claim tenable after Manatt failed to provide virtually any evidence that the name "Princess Diana" had been used as a trademark or achieved secondary meaning for charitable services, or that Franklin Mint's advertisements were false or deceived a substantial segment of their audience. The appeals court remanded on the issues of malice and damages.

CASE SUMMARY

FACTS

After Princess Diana's death in 1997, collectibles maker Franklin Mint Co. ("Franklin Mint") sought to design a new line of Princess Diana products with authorization from The Diana, Princess of Wales Memorial Fund (the "Fund"), a charitable trust established by the Princess's estate. When the Fund declined to provide authorization, Franklin Mint manufactured and sold a line of Diana products with advertising stating that "[a]ll proceeds to go to Diana, Princess of Wales' favorite charities" or "100% of your purchase price will be donated to Diana, Princess of Wales' favorite charities."

In May 1998, the Fund, through its attorneys at Manatt, Phelps & Phillips, LLP (the "Firm"), brought suit against Franklin Mint in the Central District of California, alleging trademark infringement, dilution, and false advertising under the Lanham Act and California law, and right of publicity infringement.

The federal district court dismissed the right of publicity claim after applying British law, which did not recognize such a right. The court granted summary judgment for Franklin Mint on the dilution and false advertising claims, finding that the Fund had failed to demonstrate that the name Princess Diana had acquired secondary meaning for charitable services, a necessary element of the dilution claim, and that the "all proceeds" advertisements were literally true. Finally, the court awarded Franklin Mint attorneys' fees of more than $1.6 million in connection with the Lanham Act claims, finding that the Fund's dilution and false advertising claims were groundless and unreasonable based on the evidence presented. The Ninth Circuit affirmed on all counts in June 2002.

In November 2002, Franklin Mint sued the Firm and the Fund for malicious prosecution of the federal trademark dilution and false advertising claims in the Superior Court for Los Angeles County. The Fund settled, but the Firm moved for summary judgment on the ground that there was probable cause for both claims. Following the grant of summary judgment to the Firm by the trial court, Franklin Mint appealed.

ANALYSIS

In reversing the decision of the trial court, the California Court of Appeal held that no reasonable attorney would have considered either of the dilution or false advertising claims tenable. In California, to succeed on a malicious prosecution claim, a plaintiff must prove the underlying action was (1) terminated in the plaintiff's favor, (2) prosecuted without probable cause, and (3) initiated with malice. Regarding probable cause, the plaintiff must show that the defendant relied upon facts which he had no reasonable cause to believe were true, or sought recovery upon a legal theory which no reasonable attorney would have thought tenable.

Applying this standard to the federal dilution claim, the court found that there was no legally tenable argument that Princess Diana or the Fund ever used "Diana, Princess of Wales" as a trademark. The court acknowledged that Princess Diana supported many charities and promoted them through personal appearances, but found there was no evidence that she used her name or likeness as a trademark in connection with providing any services. The court distinguished cases in which the names or images of other celebrities had been protected under trademark law, finding those individuals achieved public recognition in connection with their provision of services, while Princess Diana did not. Indeed, the very items submitted in support of the dilution claim contained textual references to Princess Diana only as an individual, and did not identify any services offered by her, demonstrating the widespread and primary use of her name as an individual. Thus, according to the appeals court, no reasonable attorney would have thought that Princess Diana had used her name or likeness as a trademark, much less that her name had acquired the level of secondary meaning necessary to support a dilution claim. The court rejected the Firm's defense that the uniqueness and complexity of the issues and the lack of directly controlling authority excused its prosecution of the claim, finding that a proper understanding of trademark principles and their application to the facts of this case was neither "difficult nor mysterious."

The court also found that the false advertising claim was not tenable. To support the false advertising claim, the Firm alleged that Franklin Mint literally advertised that all proceeds from all Princess Diana merchandise would be donated to all of Princess Diana's charities. The court found, however, that the "all proceeds" advertisements attached to the Fund's complaint clearly did not make those representations, and no reasonable attorney would think they did. The court then examined the Firm's second theory, namely, that some of the advertisements misleadingly suggested that Franklin Mint was donating to charity a portion of the proceeds from the specific product depicted in each ad, when in fact Franklin Mint was not doing so. The court found, however, that even if the ads were contextually deceptive, the Firm had failed to show a significant number of customers were deceived by the ads. Instead, the Firm provided only one statement from one customer that supported this theory, while the other customer statements showed only that they were confused about the Fund's association with the products, which was irrelevant to this claim. Accordingly, the appeals court found that no reasonable attorney would think that the false advertising theories were tenable.

Because the appeals court found that the Firm had no probable cause to prosecute either claim, it remanded the case to the trial court on the malice and damages issues.

Associate Justice Richard Mosk issued a vigorous dissent, arguing that the court mistakenly shifted the burden of production and persuasion to the Firm, that Franklin Mint had failed to establish a lack of probable cause, and that even so, the Firm had submitted volumes of evidence in support of its claims during the federal trial (which Franklin Mint should have, but did not, submit). Mosk wrote, "[O]ne can sympathize with any party that is sued and prevails . . . . [but] that does not mean that the lawyers who represented the losing party should be fair game. I hope there is not a diminishing appreciation by the judiciary for the increasing hazards and pitfalls faced by those in private legal practice." Further, noting the potential chilling effect of the ruling, Mosk explained that "[a]n attorney who asserts claims on behalf of a client should not be exposed to a malicious prosecution claim just because those claims do not fall within the four corners of established case precedent or the specific words of a statute."

CONCLUSION

This decision sets a surprisingly low standard for malicious prosecution of federal trademark dilution and false advertising claims in California. Practitioners pursuing novel or unorthodox legal theories in California, in particular, should be aware of this decision and its implications.

May 2010 Issue

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You Are What You ®

by Robert D. Litowitz

With the 132nd Annual Meeting of the International Trademark Association just days away, I find myself thinking back to the first INTA annual meetings I attended in the late 1980s and how much things have changed. Back then, Saul Lefkowitz, our inspiration, mentor, and friend, was still with us, dispensing sage wisdom about law and life with his "trademark" gentle humor, keen feel for the subtleties and nuances of the law, and a photographic memory of every trademark decision dating back to the times when primitive ranchers first embossed their brands on the hides of their cattle. Go to Saul with a seemingly intractable issue, and if the answer was not at his fingertips among the hundreds of case summaries he kept on index cards in his desk drawer, he would stretch a long arm across his desk to snatch a dusty USPQ from his bookshelf and, as if by instinct, crack open the thin tan volume to the precise page containing the dispositive answer.

Back then, of course, INTA was still the United States Trademark Association, or, ironically, for an organization dedicated to protecting the integrity of brand names, USTA, an acronym it shared with the United States Tennis Association. Fortunately, the organization of short-tempered Jimmy Connors and John McEnroe never got wind of the tennis tournament held at "our" USTA's annual meeting, or there would have been big trouble.

Back before the Internet, domain names, cybersquatting, UDRP, and metatags, trademark disputes remained focused on terrestrial concerns, and when most Americans heard the word "brand" they thought of familiar products like Levi's® jeans, Campbell's® soup, and Ivory® soap. Today, they simply look in the mirror because the phenomenon of "personal branding" and "personal brands" has become universal. A quick search of Amazon.com® reveals dozens upon dozens of books eager to help each of us build our personal brand. There's even "The Complete Idiot's Guide To Branding Yourself" to help even the most brand–challenged among us "stand out from the crowd" just like Target®, Starbucks®, and Victoria's Secret®. And we no longer have to content ourselves with traditional face−to−face networking and relationship building. We can market our personal brands on LinkedIn®, Facebook®, and, most recently, on Twitter® in 140 characters or less.

No doubt the 132nd annual INTA meeting will be bigger, better, and more exhausting than ever.– Long gone are the banks of hotel payphones and carousel slide presentations from USTA meetings of a bygone era. –This year, iPhone® evangelists will vie with BlackBerry® disciples, and there are sure to be a healthy number of iPads® in lieu of laptops. But for all the seismic technological, cultural, and social changes that have swept over our profession, the essence of INTA remains intact and true to the ideals and high standards embodied by the quintessential INTA patriarch, Saul Lefkowitz. It remains an eclectic and sophisticated international gathering of elite trademark professionals dedicated to the proposition of protecting brand names—yours, mine, and ours.