

So There's Trouble in the Tablet World...

Recently, tech giant Apple sued Samsung under trademark infringement for allegedly copying the style, look, and feel of their beloved *iPad* and *iPhone* to create the Galaxy Tab and Galaxy X phones. Just the other day, a motion to expedite discovery was filed, requesting Samsung offer up samples of their *Galaxy S2, Galaxy Tab 8.9, Galaxy Tab 10.1, Infuse 4G, and 4G LTE or "Droid Charge"*. The request includes not only products, but packaging and inserts as well.

Apple claims the products are confusingly similar, with icons and interfaces strikingly similar on the Samsung devices. Are the items/brands confusing you?

Let's figure this one out...

A little bit about trademarks:

- They never wear out as long as you keep them in use.
- With reasonable care, they can be a perpetual asset.
- They become more valuable with use.
- They cannot exist or be protected apart from actual use. Without use, the mark cannot perform its function of identifying the products or services of a particular source and differentiating them from the products or services of others. Their function is to drive business.

Selection of a trademark or service mark:

- From a legal perspective, coined or "fanciful" works, such as EXXON or KODAK, form the strongest marks and are entitled to the broadest scope of legal protection.
- Ordinary words applied to unrelated goods or services are also strong marks. For example, "Apple" computers! No relation of fruit to technology, so the novel title sticks and markets well.
- Marks describing a quality or element of the goods cannot be protected unless through extensive use, the relevant purchasing group has come to associate the marks with the source of the goods or services.
- Generic words are not protectable because everyday designations cannot be monopolized.

Testing the mark:

When testing for trademark infringement, courts will look at: Strength of the mark, similarity, and proximity in the marketplace.

Strength - The Apple "apple" trademark is pretty strong, arguably one of the strongest in the tech market, or any market. It is easily recognizable, and has a following all its own. The "S" for the Galaxy products is a good, distinct mark as well, but does not have the following of the apple.

Similarity - In regards to interface and icons, the Samsung device does have some which are similar to the Apple icons, but we don't believe it would lead one to think they were using an iPhone by the time they began using the device.

However, this leads us to the prong of similarity. Similar icons is a point of contention when they are advertised on packaging and commercials. Seeing these icons in commerce *could* actually lead one to believe it was an Apple-related device, if they were not paying attention, or were not as tech-savvy as others. This prong will weigh heavily in court.

Proximity - Finally, proximity in the market. This prong will definitely raise and answer some questions. Of course these devices are in the same market, sold in the same places (with the exception of there being Apple stores, but no "Samsung Stores"), and are head on competitors of one another. When deciding whether or not consumers will be confused, the undeniable proximity of these items in the market will be a major determining factor. In many cases, sales could be confused, especially based on the look and feel of the devices. Sales contribute to part of the story; Apple users are finding a suitable substitute, or not-so-savvy users are marketed into the wrong purchase. The court should have an interesting time weighing these factors.

We'll keep watching this one to see how the questions of monopoly, perfect competition, and obviousness in innovation are answered. Stay tuned!