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Protecting the Least Sophisticated Potential Consumers

November 4, 2011 by Steve Baird

When the "[trademark bully](#)" epithet is hurled at a trademark owner "caught in the act" of enforcing or otherwise protecting its intellectual property rights, another common accompaniment is the expressed outrage and indignation that [no one could ever possibly be confused](#).

Here are a few points worth noting:

1. The test of infringement is [likelihood of confusion](#), not actual confusion.
2. Likelihood of confusion is [not only to source](#), but sponsorship, affiliation, etc.
3. If a famous mark is involved, [likelihood of confusion isn't even required](#).

And, perhaps most importantly, [as the Trademark Trial and Appeal Board recently reminded](#), likelihood of confusion determinations must be based on "the least sophisticated potential consumers."

Let's just say, look around, that's an awfully low threshold.

So, when hurling the epithet it's probably a good idea to make sure your conclusion to apply the label is based on what the law is, and not what you think the law should be.

