

Analysis of the Critical Use of Trademark in Films under the Realm of Lanham Act

การวิเคราะห์การใช้เครื่องหมายการค้าอย่างมีนัยสำคัญในงานภาพยนตร์ ภายใต้ขอบเขตแห่ง Lanham Act

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Abstract

Trademarks are also featured prominently in films. Filmmakers' reputation and goodwill may be damaged and held responsible for the disregard or harmful use of a brand. When the use of a trademark mistakenly leads consumers to believe that the use of the trademark has been approved or sponsored by the owner, a legal problem may arise. Therefore, use brand products so as not to offer or imply sponsorship by the proprietor. This article therefore aims to examine the critical use of trademarks in films and the extent to which a trademarked image can be included in a film. The research findings show that infringement of the Lanham Act could not pose a direct risk to film producers. The way the film producers refer to an existing trademark determines whether or not they are responsible for the violation of trademarks or for public dissatisfaction. However, the trademark law includes exceptions which make it possible to use the existing trademarks fairly without any problems. The fair use doctrine permits the limited use of a trademark without permission from the owner and provides for nominative use and parody. In addition, a notice of ownership of marks or trademarks used in the production can be included in long distances in a dispute.

Key words: Trademark, Film, Infringement, Fair Use, The Lanham Act

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บทคัดย่อ

เครื่องหมายการค้ามักเป็นจุดเด่นในงานภาพยนตร์ โดยชื่อเสียงและความนิยมของผู้สร้างภาพยนตร์อาจได้รับความเสียหายจากการละเมิดเครื่องหมายการค้า เมื่อผู้กระทำละเมิดเครื่องหมายการค้าทำให้ผู้บริโภคเชื่อว่าการใช้เครื่องหมายการค้านั้นได้รับการอนุมัติหรือได้รับการสนับสนุนจากเจ้าของแล้ว จึงก่อให้เกิดปัญหาทางกฎหมายขึ้น ดังนั้น งานวิจัยฉบับนี้จึงได้ศึกษาถึงกรณีการผลิตภาพยนตร์ที่มีการแสดงถึงเครื่องหมายการค้า อันควรต้องมีข้อจำกัดเพื่อไม่ให้เสนอหรือบอกเป็นนัยถึงการสนับสนุนจากเจ้าของเครื่องหมายการค้า โดยบทความนี้มีวัตถุประสงค์เพื่อตรวจสอบการใช้งานที่สำคัญของเครื่องหมายการค้าในงานภาพยนตร์ และขอบเขตที่ภาพเครื่องหมายการค้าสามารถปรากฏอยู่ในงานภาพยนตร์ได้ ซึ่งผลการวิจัยแสดงให้เห็นว่า การละเมิดต่อ Lanham Act ไม่สามารถก่อให้เกิดความเสี่ยงโดยตรงให้กับผู้ผลิตภาพยนตร์ เพราะวิธีที่ผู้ผลิตภาพยนตร์อ้างถึงเครื่องหมายการค้าที่มีอยู่จะเป็นตัวกำหนดว่าพวกเขาจะต้องรับผิดชอบต่อการละเมิดเครื่องหมายการค้า หรือเป็นการสร้างความสับสน หรือหลงผิดในเครื่องหมายการค้าต่อสาธารณชนหรือไม่ อย่างไรก็ตาม กฎหมายเครื่องหมายการค้า รวมถึงข้อยกเว้นที่ทำให้สามารถใช้เครื่องหมายการค้าที่มีอยู่ได้อย่างยุติธรรมนั้น ต้องคำนึงถึงหลักการใช้งานที่เป็นธรรมด้วย ซึ่งหลักดังกล่าวอนุญาตให้ใช้เครื่องหมายการค้าอย่างจำกัด สำหรับกรณีที่ไม่ได้รับอนุญาตจากเจ้าของ จะต้องเป็นการใช้เพื่อบรรยายหรือเปรียบเทียบสรรพคุณสินค้าหรือเป็นการล้อเลียน นอกจากนี้ การระบุถึงความเป็นเจ้าของเครื่องหมายการค้าที่ใช้ในการผลิตภาพยนตร์อาจเป็นข้อพิพาทที่อยู่ห่างโดยระยะทางได้

คำสำคัญ: เครื่องหมายการค้า ภาพยนตร์ การละเมิด หลักการใช้งานที่เป็นธรรม รัฐบัญญัติ Lanham

1. INTRODUCTION

Film trademarks are a way to secure intellectual property when filming. The use of a trademark can distinguish goods and services from each other. Mark designs, logos and images may take various forms. Some sounds and smells can also be used as marks.⁴ Characters are commonly used for eating, drinking, driving, buying and wearing branded products in movies. It should take into consideration the relevant legal questions and opportunities for making money offered by filmmakers who wish to use branded or recognizable products in films.⁵

For filmmakers, the question is whether the use of the trademark as a trade mark is a placement in their films. In general, the answer to this is “no”. There will be no infringement on the trademark when a character is simply drinking from the coke can with the trademark “COCA-COLA” or wearing a t-shirt with a trademark “MAMBO”. The trademark is not used as a source badge, so that there is no problem with the filmmaker.

Trademark owners may, without their agreement in the form of fiction and other media production, object to the use of their trade marks in their films and seek to order them, in accordance with Section 43(a) of the Lanham Act (15 U.S.C. S. 1125(a)), by file a trade-mark infringement action under the Federal Trade Mark Dilution Act, and mark dilution in contravention of the New York General Business Act’s anti-dilution status (Article 368-d).

Obviously, there is a fight between the rights of trademarks and the properties of others to classify themselves in their own work. So how in addition to infringement of marking law do the filmmakers or producers employ names, logos, images, products and monuments in their films? Recalling that some of these legal decisions lead to artistic merit can strengthen their confidence to use the marks in their works.

2. RESEARCH OBJECTIVES

This research aims to examine the critical use of trademarks in films and the extent to which a trademarked image can be included in a film. Additionally, the focus of research is on the relationship of the fair use doctrine of trademarks with the film industry of the US, which is not always clear and close between infringements and fair use.

⁴ World Intellectual Property Organization (WIPO), *What is Intellectual Property?* (Geneva: WIPO).

⁵ Arts Law Centre of Australia, ‘Information Sheet - Using Brands and Products in Film’ (2016).

3. RESEARCH METHODOLOGY

The application of documentary analyzes was identified as a technique for collecting and analyzing data. In this research, case studies are also extensively used to generate new ideas and to illustrate theory.

4. RESEARCH FINDINGS

The film industry is the world's emerging major markets, which bring huge benefits to the entertainment industry. In the event of a legal problem it is important that the rights and interests of trademark holders in movies should be safeguarded. The legislation allows artistic freedom of producers and directors to display trademarks only with due cause in their films. The right to use a trademark is a privilege for the film producers without the consent of the right owner. However, fair use is not defended when a product's sources, endorsements or sponsorships are probably misleading.

5. INVESTIGATION OF TRADEMARK INFRINGEMENT IN FILM

The purpose of trademark legislation in filmmaking is to avoid confusing, mistaken or misleading potential consumers as to whether the proprietor of a trademark is either (1) the film producer or the source, (2) the film endorsing or sponsoring it, or (3) the use of a trade mark or goods in a film otherwise approved.⁶ The center of attention of a trademark infringement motion is "likelihood of confusion".

5.1 Likelihood of confusion

The Second Circuit set out the following eight elements used to determine whether or not there is a likelihood of confusion: (1) the strength of the mark of the plaintiff; (2) the degree of similarity between the marks of the plaintiff and the marks of the defendant; (3) the proximity of the products of the parties on the market; (4) the likelihood that the plaintiff would 'bridge the gap' between the products; (5) the degree of genuine consumer confusion; (6) the good or bad faith with which the defendant adopted the mark of the defendant; (7) the quality of the product of the defendant; and (8) the sophistication of the consumer group concerned.⁷ There is no single factor.

⁶ 'How to Use Brands and Products in Film' (*Rodriques Law, Business and Entertainment Attorneys*, 29 June 2017) <<https://rodriqueslaw.com/blog/how-use-brands-and-products-film>> accessed 9 May 2019

⁷ *ibid.*

Nor does finding a likelihood of confusion require a high quality discovering on a majority of these “likelihood of confusion”.⁸

5.1.1 Strength of the mark

The extra deeply in the mind of the consumer is the mark of a senior user; the more probably the mark of the junior user conjures up a photo of the product of the senior user as a substitute for the junior user. The Yankees, the Dunkin Donuts, Mercedes-Benz, the Budweiser Beer, Stolichnaya Vodka and various liquors are without doubt the strong, well-known brand names. But this alone no longer leads to confusion about source, endorsement or sponsorship.

5.1.2 Degree of similarity between the marks

The more similar the product, the greater the probability of confusion. The court held in Universal City Studios, Inc. v. Nintendo Co., Ltd. that each trademark should be compared in full, so that confusion could be decided. For example, Vitarroz Corp. v. Borden, Inc. argues that the environment in which a designation is used has an impact on their appearance and colour, and on their impression, and that that it is clearly important to place the marks alongside other identifying but dissenting symbols, in Hormel Foods Corp. v. JIM Henson Productions, Inc. It was stated by the court.⁹

If such principles were to take account when Ben and Jerry and the brands and products shown as a whole, it would be unlikely if the filmmaker would use the Empire States Building, Mercedes-Benz, Dunkin’ Donuts, Budweiser or Stolichnaja, along with different marks of whiskey, wodka, and beer, to propose significant support or affiliation.¹⁰

5.1.3 Proximity of the products

The Court found the defendant’s mark in Hormel Foods Corp. v. Jim Henson Productions, Inc. to be far fewer in order to foster patron confusions, where the complainant and the defendant products occupy a specific market for merchandising, e.g., ‘luncheon meat for SPAM, and a Muppen motion picture for Spa’am’.¹¹

⁸ Lauren P Smith, ‘Trademarks and the Movies: An Af-fair Use to Remember’ (2000) 48 Cleveland State Law Review 415.

⁹ Options Clearing Corporation (OCC), ‘Hormel Foods Corporation – 2 for 1 Stock Split Futures Symbol: HRL1D’ (1 February 2016) <<https://www.theocc.com/webapps/infomemos?number=38347>> accessed 10 May 2019

¹⁰ ‘How to Use Brands and Products in Film’ (n 6).

¹¹ ‘Hormel Foods Corporation, Plaintiff-appellant, v. Jim Henson Productions, Inc., Defendant-appellee, 73 F.3d 497 (2d Cir. 1996)’ (JUSTIA US law) <<https://law.justia.com/cases/federal/appellate-courts/F3/73/497/556840/>> accessed 10 May 2019

“Strip clubs and video games are no longer related products”, in the case of ESS ENTERTAINMENT versus the Rock Star Video. The Play Pen is a strip affiliate of food and food and dancers. Grand Theft Auto: San Andreas, video sports are usually done at home and are placed on the screen. The Play Pen and San Andreas are no longer directly competitive with buyers, though the client can overlap.¹² In the context of Mercedes and a fictional movie picture, Ben and Jerry would have no likelihood of confusion if they were applied to this principle, since the film and the brands depicted are non-competent and given that they occupy distinct cars on the markets for merchandising.

5.1.4 Bridging the gap

The court held in Westchester Media v. PRL USA Holdings, Inc. that the risk of affiliation and sponsorship confusion increases as the junior user's market expands naturally to a senior user. These gaps are not limited to the risk of expanding pathways and entering related areas. The Court noted that the complainant did not and never was involved in video play and does not plan to do so in ESS ENTERTAINMENT v. Rock Star Videos. Offenders had never been to the Strip Club or planned to join.¹³ For players who view Pig Pen it is unlikely that different companies and product lines will recognize that the Play Pen is modeled to believe that Play Pen is endorsed and sponsored by its owners.¹⁴

There is no indication that any of the brands depicted in Ben and Jerry are going to join the film industry by Annhuser-Busch or another company. Many companies, including Mercedes, sponsor films or endorse them by placing products.¹⁵ However the movie maker claims to have partnered with any brand to promote the film. There is no indication. In this case, “actual consumer confusion” should be demonstrated.¹⁶

¹² Kieran G Doyle and Jill K Tomlinson, ‘Brands on the Silver Screen, the Television Screen and the Computer Screen’ in KG Doyle and SH Klein, *Advance seminar on trademark law 2010* (Practice Law Institute 2010).

¹³ Briahna Gray, ‘E.S.S. Entm't 2000, Inc., v. Rock Star Videos, Inc.: Court Declares “Grand Theft” Crime Free’ (*JOLT digest*, 10 November 2008) <<https://jolt.law.harvard.edu/digest/ess-entmt-2000-inc-v-rock-star-videos-inc>> accessed 10 May 2019

¹⁴ Margaret M Morrow, ‘ESS ENTERTAINMENT v. Rock Star Videos, 444 F. Supp. 2d 1012 (C.D. Cal. 2006)’ (*Court Listener*, 28 July 2006) <<https://www.courtlistener.com/opinion/2328482/ess-entertainment-v-rock-star-videos/>> accessed 10 May 2019

¹⁵ The Upfront Analytics Team, ‘Why is Ben & Jerry’s sponsoring open air cinemas?’ (*The Upfront Analytics*, 13 August 2015) <<http://upfrontanalytics.com/why-is-ben-jerrys-sponsoring-open-air-cinemas/>> accessed 10 May 2019

¹⁶ ‘How to Use Brands and Products in Film’ (n 6).

5.1.5 Actual confusion

Potential film consumers must show the actual confusion of the manufacturer, sponsoring or endorsing. No evidence existed that consumers, members of the media or anyone else confused Spa'am with SPAM or as a person spontaneity in Caterpillar v. Walt Disney Co. sponsored by SPAM. No evidence existed. The lack of evidence for Walt Disney to make George of the Jungle 2 available to the general public has proved to be a lack of real consumer confusion.¹⁷

5.1.6 Bad Faith

In Horil Foods Corp. v. Jim Henson Productions, Inc., Henson held that nothing could be gained from creating a consumer confusion which led to Henson and Hormel's belief in a business association. Nothing can suggest that Henson was acting in bad faith.¹⁸ There is no evidence to show that, in application of this principle, the filmmaker deliberately incorporated brands and products in the film to deceive the public from the belief that the trademark owners produced, endorsed or sponsored the film or approved its brands and products otherwise depicted.

Although the filmmaker used the marks to encourage companies to pay for their brands to be integrated into the film, there is little evidence that the filmmaker was doing so in order to live up to their reputation and goodwill or to encourage the public to watch the film when it was made public. There is no proof that there can be a mistake. The public did not know that these brands would be on the stage until they watched the film, paid for the theatre, streamed it online, bought a DVD, or a friend's copy. There is no indication that any of these brands were featured in their promotional films. Consequently, using these marks and products in the film could not have influenced the purchase decisions of consumers.¹⁹

5.1.7 Quality of the products

The quality of a junior users product can be relevant in two ways in Hormel Foods Corp. v. Jim Henson Productions Inc.: (1) the lower product can cause an insult to the trademark of the claimant because the public may believe that the senior and junior products come from the same source; and (2) the same quality can tend to cause confusion about the source because of this very similarity.²⁰

¹⁷ Elaine Czach, 'Court Says "George of the Jungle 2" Does Not Infringe CATERPILLAR' (2003) 58(21) INTABulletin <<https://www.inta.org/INTABulletin/Pages/CourtSays%E2%80%99GeorgeoftheJungle2%E2%80%99DoesNotInfringeCATERPILLAR.aspx>> accessed 11 May 2019

¹⁸ Cori Phelan, 'Hormel Foods Corp. v. Jim Henson Productions, Inc., 73 F.3d 497 (2d Cir. 1996)' (1996) 6(2) DePaul Journal of Art, Technology & Intellectual Property Law 313, 314-15.

¹⁹ 'Using Brands and Products in Film' (n 6).

²⁰ Hormel Foods Corp. v. Jim Henson Prods., 73 F.3d 497 (2d Cir. 1996).

It is unlikely that a large group of the intelligent public will believe in applying this principle that Mercedes supported a low-cost, starless Indie film. These qualities might actually be why the film would not be supported by these brands first. Although “Ben and Jerry” is a large budget film (10 million dollars or more), it could have the same result. For example, Wil Smith, a Nigerian doctor who found chronic traumatic encephalopathy that affects NFL athletes, uses official NFL marks throughout the film. *Concussions* (with production budget of 35M\$) are the protagonists in this film.²¹

5.1.8 Consumer sophistication

In the background to the movie scene, *Dickie Robert: Former Child Star*, the Court in *Whom-O, Inc. v. Paramount Pictures Corp.* found the plaintiff's use of “Slip’ N Slide” as no risk of confusion, which is confusing the consumer as to who makes what product. The court further noted that it was a fact, that the appearance of the product with famous trademarks on cinema and television was a common phenomenon.²² In the case, customers and viewers would not mistake the film production company and consumers or viewers would not mistake the defendants for the toy supplier. For instance, action films often include cars in a number of situations, and the simple appearance of a Ford Taurus is not in itself sufficient to constitute unfair competition within a garden car chase scene. Because they believed that films were produced, endorsed, or promoted by The New York Yankees, Anheuser-Busch, Dunkin’s donuts or Mercedes, reasonable cinematicians would not have to buy, download, stream or rent a movie. Given that principle.

6. PROTECTION AGAINST DILUTION OF TRADEMARKS IN FILM

Should a trademark appear in the background of a film, or a character in a film refer to a product with his marked name, it cannot comply with the standard of traditional infringement in Lanham Act but can satisfy the less stringent requirements of Article 43(a) for trademark dilution findings. Mark dilution protects against the weakening or tarnishing of ‘famous marks’ by third-party uses.²³

In order to suffer dilution, a mark must have a reputation in the general consumer public. Marks are tarnished if the mark connected to shoddy quality products or is depicted in unhealthy or unease-filled circumstances, or if the trademark loses the ability to serve as a healthy identifier of the product of the plaintiff. Basically, trademarks laws are intended not only to avoid consumer confusion, but also to protect the goodwill and reputation of a trademark owner.

²¹ ‘How to Use Brands and Products in Film’ (n 6).

²² Elizabeth L Rosenblatt, ‘Rethinking the Parameters of Trademark Use in Entertainment’ (2009) 61 Florida Law Review 1011.

²³ Paul E Kim, ‘Preventing Dilution of the Federal Trademark Dilution Act: Why the FTDA Requires Actual Economic Harm’ (2001) 150 University of Pennsylvania Law Review 719.

The court found that trademark dilution is the gradual removal of marking values and a reduction in the ability of a famously recognized mark to recognize and distinguish its goods and services in *Academy of Motion Pictorial Arts & Sciences v Creative House Promotions, Inc.* The court held in *I.P. Lund Trading ApS v. Kohler Co.* that the dilution of marks could lead to an injury to the reputation of the business, because it dilutes the distinguishing quality of a mark, creating an association between a mark and a different product in the minds of consumers.²⁴ The trademark law also protects the holder against the ownership or free movement of an investment in his trademark. In contrast to the trademark infringement, dilution does not require competition or confusion in respect of a product's source or sponsorship. By showing either a blurring or a tarnishment, a risk of dilution can be established.

6.1 Blurring

Where the defendant uses the applicant's trademark to identify the defendant's own product, blurring may result in dilution, thus increasing the possibility that a trademark may lose its ability to act as the complainant's only goods identity. For example, DuPont shoes, Buick aspirin tablets, Schlitz varnish, Kodak pianos, Bulova gowns, Tylenol snowboards, Netscape sex shops, and Harry Potter dry cleaners, although non-infringing use of the same name, such as the use of the "Delta" mark for both air travel and sink faucets, may exist.²⁵

The court found that the use of the trademark must not be flouted only by the younger user in the case of *Mattel Inc. v. MCA Records Inc.* The court acknowledged the use of Barbie's marking in the song title (Barbie Girl) to have flourished, in that after the song's popular success some consumers hear Barbie's name think either of the doll and the song or maybe just a song.²⁶ The trademark's characteristics are reduced when the trademark's mark is not alone. Similarly, the court found that there is difficult to imagine anybody seeing the sexually depraved film of defendants could ever afterwards disassociate them from the cheerleaders of the plaintiff, in *Dallas Cowboys Cheerleaders Inc. v. Pussy Cat Cinema, Ltd.*²⁷

In contrast, the Ninth Circuit rejected the claim of the complainant that the use of the trademarked slip'N Slide water slide by defendants would lead to an unfavorable association between the viewers' minds of the slide and the movie, which was misused in the film for a comic

²⁴ Eugene Pak, *Defenses to a Dilution Claim Under the FTDA* (International Trademark Association 2004).

²⁵ 'How to Use Brands and Products in Film' (n 6).

²⁶ 'Mattel INC v. MCA Records INC' (*FindLaw*, 24 July 2002) <<https://caselaw.findlaw.com/us-9th-circuit/1260576.html>> accessed 12 May 2019

²⁷ *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.* 604 F.2d 200 (2d Cir. 1979).

effect, despite the misuse that resulted in injuring the character.²⁸ In *Wham-O, Inc. v. Paramount Pictures Corp.* In addition, after viewing the film, viewers found that the marks of Slip' N Slide are still associated with the water slide they identify. The Court found that that kind of abuses which the defendant placed a slide do not render less unique or identifiable the complainant's marks, nor that the complainant has demonstrated anything to prove actual dilution.²⁹

There is no evidence that Mercedes or any other brands or products have been used by the filmmaker to describe or recognize or attract the attention of the film in application of these principles. In order to market the film or to sell movie tickets, VODs, DVDs, and Blu rays, the filmmaker will not try to portray these products or brands. Nothing suggests that a customer who watches a Mercedes car will always associate a car with this movie, or maybe only think of the movie when the movie is produced and it is a great success in a box office. Mercedes was still associated with his luxury car once the film was viewed. It is also doubtful that a decline in Budweiser Beer or Stolichnaya Vodka or Dunkin' Donuts coffee will occur after watching the film.

6.2 Tarnishment

In addition to being used as the source identifier, a trademark can also prove that the product with which it is associated is of high quality (with expectations of increasing sales and product awareness). A trademark is tarnished by making consumers an unexpected or negative relationship with the trademark, which damages the trademark holder's business and reputation. Dressing may take place in different forms such as placing a trademark or its similarity in the context of sexual activity, obscenity or illegal activity.³⁰

Some cases were dismissed by the courts and those complainants were unable to remove logos and products from the films of the defendant. The claimants are concerned about selling their product, SPAM, in *Hormel Foods Corp. v. Jim Henson Productions*, if it is linked to the "evil swine" in the defendant's movie "Muppet Treasure Island", where Spa'am was the high priest for the wild boar clan adoring Miss Piggy as Queen Sha Ka La Ka La. In *Wham-O, Inc. v. Paramount Pictures Corp.*, the defendant presents a comical misuse of the Slip' N Slide toy marked by the plaintiff.³¹ It was a clear and distinct misuse, even the most young or credible cinema viewer recognized, and explicitly described in the film itself, that Caterpillar bulldozers in *Caterpillar Inc. versus Walt Disney Co.* were

²⁸ Jessica S Sachs, 'Misuse of "Slip 'N Slide" Toy in Film Not Actionable' (2004) 59(1) INTABulletin <<https://www.inta.org/INTABulletin/Pages/MisuseofSlipNSlideToyinFilmNotActionable.aspx>> accessed 11 May 2019

²⁹ *ibid.*

³⁰ Smith, 'Trademarks and the movies: An Af-'fair use to remember' (n 8).

³¹ César J Ramírez-Montes, 'The Extent to Which Trade Marks are Protected Against Dilution in Mexico and the United States' (Master of Studies in Legal Research Thesis, University of Oxford 2004).

an abuse of Lyle's evil nature and his evil plans. It was a film which was depicted by Walt Disney.³² It is clear to the more faithful viewer or child that the lightning rockets of film and television are operated by people and are merely inanimate tools for Lyle's eco-friendliness. The Court argued in this context that product appearances with known trademarks on film and television are commonplace.

The Court held in its judgement in *Mattel, Inc. v. MCA Records, Inc.* that it is less likely to be fooled by the idea that if a trade mark has been placed in a bad condition via the representation of the respondent, any trade mark owner will sponsor a negative portrait or support a negative portrait.³³ As these cases suggest, disguise does not occur simply due to the representation of the product marked in a negative context or because the holder of the trademark finds it unfair.

It will be unlikely that Budweiser Beer, Stolichnaya Vodka, Mercedes and other brands manufacturers can apply these principles in a disheartening or disgusting light for the product and mark portraits of their products in Ben and Jerry. None of these products and brands are even remotely shoddy or of poor quality or are produced for poor consumers.

7. FAIR USE DEFENSES AGAINST TRADEMARKS INFRINGEMENT LAWSUITS

It is a right that is given to others to use the trademark of an owner without the owner's consent in a reasonable way. However, the defense of fair use will not be available unless the source, endorsement or sponsorship of a product is susceptible to confusion. Section 1115(b)(4) of the Lanham Act states:

"The use of the name, term, or device charged to be an infringement is a use, otherwise than as a mark, of the party's individual name in his own business, or of the individual name of anyone in privity with such party, or of a term or device which is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin...."

The Lanham Act lets the filmmakers mention a trademark if they use the primary and not the secondary, trade-protected meaning. Just because Apple is a registered mark does not mean that the word "apple" can still be used to sell apples and other apple products.³⁴ And, without breaking the company name, the filmmakers can quite fairly say these apples are a "best buy" in the market.

Besides, the Lanham Act allows announcers to name a brand so that a product / brand may be compared to a competitor as long as the advertisement is not disappointing. There are some

³² *Caterpillar Inc. v. Walt Disney Co.*, 287 F. Supp. 2d 913 (C.D. Ill. 2003).

³³ William M Byrne Jr, '*Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120 (C.D. Cal. 1998)' (*Court Listener*, 3 August 1998) <<https://www.courtlistener.com/opinion/2532136/mattel-inc-v-mca-records-inc/>> accessed 11 May 2019

³⁴ Rosenblatt, 'Rethinking the Parameters of Trademark Use in Entertainment' (n 22).

consequences for preventing such use from the first amendment and it also promotes healthy competitiveness that allows consumers to make informed decisions.³⁵ In cases of trade dress or trademark infringement, two fair use defenses are available: classical fair use and nominative fair use.

7.1 Classic fair use

A usage is traditional fair use or classic fair use where the defendant only described the defendant's own product with the complainant's mark. To prevail on a classic fair use defense, a defendant must show: (1) that it has not utilized the trademark as a trademark or service mark; (2) that it has used the trademark fairly and in good faith; and (3) that it has used the trademark only to describe its own goods or services.³⁶

The classic fair use exclusion in *Sunmark, Inc. v. Ocean Spray Cranberries, Inc.* allowed Ocean Spray to describe its cranberry drink as a "sweet-tart" tasting, despite the fact that Sunmark has a trademark for its candy under the term "SweetTart".³⁷ The trademark holder, the "Boston Marathon", attempted unsuccessfully to prevent a TV station from using the name in its coverage of the Boston Marathon on WCVB-TV v. Boston Athletic Association. In the *Brookfield Communications Inc. v. West Coast Entertainment Corp.*, on the other hand, the court held that, while the defendant could legally use "Movie Buff" to define a filmed devotee, it could not use "MovieBuff", because the term "space" was not English without the word space, but used in contrast to the meaning of the motion picture to use Brookfield's products and services.³⁸ The classic fair-use defense of these principles would not be available, because there is no evidence that the filmmaker uses brands and products for the filmmaker's own documentary descriptions or references.

7.2 Nominative fair use

It is a nominative usage when the owner of a trademark or its goods / services is referred to, without trying to use the actual trademark for commercial purposes. Just referring to the Burger King does not mean that a filmmaker or producer tries to take the mark or persuade others that Burger King has supported him. Likewise, having a coke on the camera implies that the Coca-Cola Company does not sponsor or endorse it. With branding and content from all angles, it prevents all uses or all

³⁵ Ross D Petty, 'Initial interest Confusion Versus Consumer Sovereignty: A Consumer Protection Perspective on Trademark Infringement' (2008) 3 *The Law Journal of the International Trademark Association* 757.

³⁶ Tulip Mahaseth, 'The Best Defense is a Good Offense Nominative Fair Use and other Defenses to Trademark Infringement' (*Anti Piracy & Anti Counterfeit Blog*, 26 February 2019) <<https://blog.redpoints.com/en/nominative-fair-use-defenses-trademark-infringement>> accessed 11 May 2019

³⁷ Joel Timmer, 'The Depiction of Trademarked Landmarks in Fictional Films: Protecting Filmmakers from Infringement and Dilution Liability' (2016) 15 *The John Marshall Review of Intellectual Property Law* 676.

³⁸ Smith, 'Trademarks and the movies: An Af-'fair use to remember' (n 8).

references to any brand because it has been not granted permission creates a dangerous slippery path.

Contrary to classic fair use, the use of a mark to identify or to refer to the complainant's product is nominative, although the defendant's ultimate goal is to depict his or her own product. The Court held at *Mattel Inc. v. Walking Mountain Productions* that the defendant must show that (1) without using the trademark to prove the name of his use the product or service of the claimant should not be easily identified; (2) the use shall be made of only the marking reasonably necessary for the identification of the complainant's product or service; and (3) nothing shall be done by the user which, together with a trademark, would be to suggest the mark holder's sponsorship or endorsement.³⁹

In the case of *New Kids on the Block v. New America Pub., Inc.*, the court held that nominative fair use generally applies in cases where a product without a particular trademark often cannot be referred to without compared or criticized or referred. While the plaintiff is responsible for persuading him to display the probability of confusion with a claim on a mark-infringement, the Court of Brother Records held that the burden of not demonstrating confusion towards the defendant is shifted by advocating nominal fair use.⁴⁰

The defendants use a complainant's slide in *Wham-O, Inc. v. Paramount Pictures Corp.* to identify the slide of the complainant that is not identifiable otherwise, and by doing so (1) the defendant uses it to identify the complainant's slide as a particular product; (2) the defendants use only as much trademark as is reasonably needed to identify their product or service - the character refers twice on behalf of the product in the film, the logos or trademarks of the claimants are not otherwise displayed in the document, and the defendant refers to the trademarks unnecessarily or abusively; and (3) he uses the defendant nothing to suggest the sponsoring or endorsement of the trademark owner in conjunction with the trademark.⁴¹

As in any other part of a film dialogue, the trademarks of the complainant form part of the jumble of images in the film; they are not highlighted in order to exploit the value of the trademark of the plaintiff. There is nothing in the record that indicates that the plaintiff's markings were imposed on the film by defendants and nobody is unreasonably displayed or abused in the efforts of the defendants to promote the mark of the plaintiff. The defendant however uses the marks and products in a specific and unique descriptive way to evoke associations with an iconic toy of a child. As the

³⁹ Mark Lemley and Stacey L Dogan, 'Grounding Trademark Law through Trademark Use' (2007) 92 Iowa Law Review 1669.

⁴⁰ Smith, 'Trademarks and the Movies: An Af-'fair Use to Remember' (n 8).

⁴¹ Sachs, 'Misuse of "Slip 'N Slide" Toy in Film Not Actionable' (n 28).

Court observed, the use of the signature scene to foster interest in films, as any filmmaker can confirm, is not unusual for film producers-and for the products and props within it. Car chasing films in cars; firearms gunplay movies do; high-end clothes do that.

In summary, three facets of the test in question suggest that filmmakers use their brands, products and landmarks for nominative purposes. The director used brands to identify or mention branded products, where the people used to drink Budweiser Beer, Stolichnaya Vodka and other liqueur brands, and Mercedes-Benz drives. In order to appeal, or to endorse the film, the filmmaker used brands and products more than it was reasonably necessary or to use his products in the scenes of the trade names. There is no evidence to suggest that the filmmaker used the marks as if they were his own, there is nothing that indicates. There is also no evidence to suggest that the filmmaker's representation of the Empire State Building in the movie is designed to promote the film's plot for a purpose other than to show the action on stage in New York City.

8. FIRST AMENDMENT: ASSESSMENT OF DEFAULTS ON STANDARD TRADEMARK CLAIMS

First Amendment to the Constitution protects artistic freedom of expression. A less stringent standard is to be applied when creating a work of art before considering violation of the rights of another person, because freedom of expression is a basic right.⁴² However, things are rarely as clear as they can be. Not every word is protected in the same way. Commercial speech in our legal system is much more restricted because it aims to influence trade and to influence it directly. That is why advertising is controlled much more rigorously than other language types.

The artistic expression of a film can in some ways be taken into account. But it cannot also be considered a highly commercial form of expression, given its scale and impact on the economy. The problems of Ginger and Fred have been considered for *Rogers v. Grimaldi*. The name of this obscure film damaged appreciation of the reputation of Fred and Ginger, and so sued Ginger Rogers. The Rogers First Amendments balance test is extended to include all expressive uses of a mark or a trademark dress in artistic wood by the second circuit and other courts. In *Rogers vs. Grimaldi*, if (1) it has artistic relevance; and (2) it does not expressly mislead the source or content of the work it does not include the literary title into Lanham Act. The artistic works are films, plays, books and songs.⁴³

8.1 Artistic relevance

The defendant must first show that the use of trade dress and the trademark of the plaintiff exceeds the minimum threshold of artistic relevance to the work content in order to prevail over a defense of the First Amendment in the Rogers Test. In the *New York Racing Ass'n v. Perlmutter Pub.*,

⁴² American Civil Liberties Union (ACLU), 'Freedom of expression' (ACLU) <<https://www.aclu.org/other/freedom-expression>> accessed 11 May 2019

⁴³ Smith, 'Trademarks and the movies: An Af-'fair use to remember' (n 8).

inc., the court found it necessary for artistic aim to accurately represent the stage (realism) by use of the marks of the applicant in the pictures of the defendants when the mark is actually displayed in the depicted scene.⁴⁴ The Lanham Act should therefore not apply to the shirts of the defendants on which those pictures are reproduced, as the interest in freedom of expression prevails over consumers' confusion.

At the University of Alabama v. Moores the court held that Moore is an artistic depiction of the University's uniforms because the colors and design of the uniforms are necessary in order to represent the famous football stories in Alabama.⁴⁵ Ben and Jerry would fulfill the artistic relevance of the Rogers test in applying these principles. The use of Budweiser Beer, Stolichnaya vodka, Mercedes-Benz car, and other markings or trade-dress by the filmmaker bears certain artistic importance that brands and products in the film accurately represent. The scenes depict disturbed young people who normally try to work in drunken amazement. In fact, without alcohol, a car, and even the Empire State Building, the narrative would be completely different.

8.2 Explicitly mislead as to the source or content

The second circuit applies the likelihood of a confusion test used for the evaluation of standard trademark violations claims, as a determination of if the artistically significant trademark misleads the source and content of the work. However, the court held in Cliffs Notes that the probability of confusion should be particularly compelling in order to outweigh the interest of the first amendment.

Debbie performs several gend-acts in the Dallas Cowboys Cheerleaders Inc. vs. Pussy Cat Cinema Ltd., some twelve minutes from a Porn movie Debbie Does Dallas, while dressed or partly dressed in a uniform strikingly similar to Dallas Cowboys Cheerleaders. The Court held that, due to the standards set in the film, the Dallas Cowboys Cheerleaders were reminded and that it was particularly impressive that the Dallas Cowboys Cheerleaders could relate to the defendant's film, and that it should be sponsored by Dallas Cowboys Cheerleaders provided that some of the protagonists permits the defendant to use the film. Furthermore, the defendants have published the featured movie with brand names that represent debbie in an allegedly infringing uniform containing

⁴⁴ 'ESS Entertainment v. Rock Star Videos, 444 F. Supp. 2d 1012 (C.D. Cal. 2006)' (*Court Listener*, 28 July 2006) <<https://www.courtlistener.com/opinion/2328482/ess-entertainment-v-rock-star-videos/>> accessed 11 May 2019

⁴⁵ 'The University of Alabama Board of Trustee v. New Life Art INC Daniel Moore' (*FindLaw*, 11 June 2012) <<https://caselaw.findlaw.com/us-11th-circuit/1603066>> accessed 11 May 2019

subtitles such as Starring Ex Dallas Cowgirl Sheerleader Bambi Woods and You'll do more than cheer for this X Dallas Cheerleader.⁴⁶

The court, on the other hand, found that Pig pen explicitly did not lead consumers into misleading about the source of defendant work in *ESS ENTERTAINMENT v. Rock Star Videos*. Although the Pig Pen contains certain parts of its Play Pen logo, it does not contain any explanatory indication that the Play Pen proprietors have supported the work or played a role in producing it, nor does it include video games or promotional materials.

If these principles were implemented, the filmmaker would meet the Rogers test. The explicit use by the filmmaker of the film manufacturer or sponsor is not known, or any of the owners of the trademarks have accepted the use of their marks or products in the film. If viewers were randomly or deliberately selected brands, for example the different brands used in one scene, it would not be likely that they would have suggestions for sponsorship or affiliation in mind. In fact, it is less likely that the title of the film contains the famous trademark of the frozen food manufacturers Ben and Jerry is deceived by their brands and products in the scenes.

8.3 Names and titles

In the case of *Rogers v. Grimaldi*, the Second Circuit stated that the law on marks does not prevent even minimum use of a person's name in the name of a work of art where the title does not specifically refer to the authority or support or mislead the public regarding the content. The Court held that Ginger and Fred exceed the artistic minimum threshold for the film's contents. The names are not chosen arbitrarily to use the advertising value of Ginger Rogers but are genuinely relevant in the story of the film. In this film, the characters are called "Ginger" and "Fred".⁴⁷

The ownership of the media enterprise in *Twentieth Century Fox Television v. Empire Distribution Inc.* sent a notice to Fox TV network in relation to the popular TV show Empire and the soundtracks that allegations created a confusion regarding the marks of "Empire" and "Empire Distribution". The court found that, when applying the Rogers test, Fox's use was "clearly significant" to the plot and location of the TV show of the defendant. The court held that, although there was danger of some consumer confusion, the use of the complainant was not explicitly misleading.⁴⁸

⁴⁶ 'Dallas Cowboys Cheerleaders Inc. v. Pussycat Cinema Ltd.' (*Case of interest*, 16 November 2010) <<http://www.casesofinterest.com/tiki/Dallas+Cowboys+Cheerleaders.+Inc.+v.+Pussycat+Cinema+Ltd>> Accessed 11 May 2019

⁴⁷ 'Ginger Rogers, Plaintiff-appellant, v. Alberto Grimaldi, Mgm/ua Entertainment Co., and Peaproduzioni Europee Associate, S.r.l., Defendants-appellees, 875 F.2d 994 (2d Cir. 1989)' (*JUSTIA US Law*, 5 May 1989) <<https://law.justia.com/cases/federal/appellate-courts/F2/875/994/179970/>> accessed 11 May 2019

⁴⁸ Eugene Volokh, "'Empire' TV Series doesn't Infringe Trademark of Empire Distribution Music Label' (*The Volokh Conspiracy*, 2 August 2016) <<https://reason.com/2016/02/08/empire-tv-series-doesnt-infrin/>> accessed 11 May 2019

Ben and Jerry would pass the test at Rogers if these principles were to be applied. The title has some artistic importance in the film (the main characters “Ben” and “Jerry”, and the title of the film does not explicitly mislead the creator, the sponsor or the support of the film.

9. CONCLUSION

A filmmaker is clearly entitled to include trademarks in a film. In cases where the film does not misrepresent the source of the product nor negatively affect the value of the trademark, it is not legally prohibited for a film to use a trademark. However, film makers are not eligible for a business split in entertainment, even if they have the right to use a trademark. Commercial divorce occurs when a product or service is abused.

Generally, the logo and products of the film brands are not necessary for blurring. A trademark holder is restricted in its ability to successfully enforce its mark rights with the aim of preventing an unauthorized use of his mark in works of art. The product is shown, but filmmakers do not have to seek approval for each use of a mark in the film. This is a very important product characteristic. When the owners of the trademarks could use their marks to stop real products being presented in films or films that they do not like, they would seriously paralyze the film industry.

Because producers are trying to prevent an uncertain, long-term and expensive dispute among competitors with unequal resources over trademarks, they have blurred logos and brand names. This can have devastating consequences for the freedom of art, however. Therefore, brands and products sometimes must be left, particularly if the brand is central to the character of the film or track and the message in film needs the brand.

In order for filmmakers to avoid accusations of trademark infringement, the following concerns must be addressed by filmmakers or producers in order to use the trademark, trade dress or mark in their films should:

9.1 Avoid the likelihood of confusion in product placement

Avoiding problems that could lead to confusion that mislead consumers to think that the product or service broadcast on a film should be connected to a source that is marked by a different product or service would be a violation of the brand. For example, a car logo can appear in a production when someone drives the car, as the logo is intended for its use. The use of a car for another purpose however could lead to the marketing of the car brand and the content producer could potentially become a risky legal area.

9.2 Adopt the fair use doctrine

The legal doctrine of fair use allows the use of a registration mark without the owner's approval and contains nominative and parody use.

9.3 Take the brand into account

The better and more valuable the brand, the more likely the film producers are to experience difficulties. Some brand owners are vigorous in monitoring and protecting their valuable brands and have legal teams ready to deal with even the slightest infringement—even on dubious legal grounds—and such film producers can find themselves on the other side of the coin.

9.4 Include recognition of trademark ownership

Any trademarks or marks used during a production (e.g. during credits) can prevent a long-term dispute by including a notice of ownership.

9.5 Get authorization to display brand names for the product

The best and most safe way to do so is to get permission from the brand owner when using another party's brand in the film production process. Otherwise, blur the branded product or remove it so that no harmful legal proceedings or lawsuits can take place.

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