

Class 14: Genericness And Nominative Use/Parody

Administrative

Next Time: Copyright!
367-76; 376-78;
378-86; 386-89

The ITP Challenge (http://telecom.colorado.edu/index.php?load=events&op=event_view&event_id=10)

Youtube Monday

Nietzsche Family Circus <http://www.losangealous.com/nfc/>

<http://www.boardsmag.com/screeningroom/commercials/3421/>

Last Time

Finish Confusion

Two more types: Source and Sponsorship.

Problems 5-8

Ivory Soap -- 99.44% pure. Counterfeit but chemically identical bars of soap. Half the price.

How has the purchaser of the knock-off been injured?

Basic Doctrine

Even in the absence of confusion of source, the use of a famous name in a manner that blurs the distinctiveness of the mark OR tarnishes the mark is diluting.

Does Not require: Direct competition.
Does not require: Confusion or Likelihood of Confusion.

Which Marks? Distinctive and Famous. Registered and unregistered

Three Defenses

Policy Rationale

Dilution

Basic Facts

Elizabethtown, KY: Population 24,000 (96,000 in the County). 39,000 copies of the catalog distributed!

On the military base, store opened called "Victor's Secret". Sold: Lingerie, romantic lighting, lycra dresses, pagers, adult novelties. Changed name to "Victor's Little Secret" later.

Moseley

Colonel was offended and sent ad to VS.

Lower Courts

Tarnishment and Blurring Established.

No Infringement (no likelihood of confusion).

Supreme Court

What is Actual Harm? Survey

Reasoning

Compare Mattel (Barbie) p.807: Classic blurring injury: if mark no longer brings to mind the senior user alone.

Seems to just be the mental association prong.

Other Questions

Genericness

Basic Test: Murphy Door Bed

Google / Genericide <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/04/AR2006080401536.html>

Ignore Note 6 (unduly confusing).

Parody / Nominative Use

Mattel Basics

Basic Facts: Aqua releases "Barbie Girl" in 1997. Mattel sues. District Court: Parody: Nominative Fair Use: Not likely to confuse or dilute.

Trademark Infringement? Special Analysis for Titles

Dilution? Reads the First Amendment into the "noncommercial use" exception.

First Amendment generally

TMs sometimes transcend their identifying purpose

Distinction not really clear in these materials. Parody: Pokes fun at the subject it "takes" itself, not at another subject. Barbie.

Satire: TM or Copr. used to get attention, but not to mock the source. Cat NOT in the Hat.

Copr rule on this is clearer: Parody is typically protected; satire is not.

What should be the rule for TM?

Nominative Use

Kozinski: First Amendment is at even more tension with Dilution than with ordinary infringement analysis

Recap TM

Merchandising / Logos