

BUL4310 READINGS FOR INDIVIDUAL ASSIGNMENT #2

KNOCKOFFS AND “BLONDE TO BLONDE” VIDEO

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Three Examples of International Trademark Disputes

1. On September 29, 1999, Spain's Supreme Court barred Nike International Ltd., of Beaverton, Oregon from using its trade name on sports apparel sold in Spain. The court ruled that Cidesport SA, a sports-goods concern based in northeastern Spain, has owned the rights to the "Nike" name on sportswear since 1932. (Nike is the name of the Greek winged goddess of victory.) The ruling does not affect Nike's "swoosh" symbol. And Nike can use its name on shoes sold in Spain because Cidesport does not make footwear. But Cidesport claims to own trademark rights to the Nike name in Cuba, Cameroon, Poland, Andorra, and Tunisia, and to have applied for trademark rights in other countries.
2. For years, Anheuser-Busch Companies of St. Louis, the maker of Budweiser beer, fought in European courts with a small Czech brewery that sold a beer called, "Budweiser Budvar."
3. In October 1999, the Moscow regional arbitration court ruled that a Russian tobacco company's packaging of two of its best-selling brands is not too similar to that of two popular Philip Morris brands in Russia, even though the competing brands lettering and pictures (of spaceships) are nearly identical. Philip Morris will appeal to Russia's Supreme Arbitration Court. (In September 1999, the Russian Patent Office's appeals board permitted Rosar, a Russian brewery, to produce Sibirskaya Korona (Siberian Crown) and found that not to violate the rights of a Mexican beermaker, Gruppo Modelo, to its Corona beer.)

Trade Dress

A commercial symbol also protected by trademark law and the Lanham Act is trade dress, which has been given more attention in recent years, although it is often not registered. Trade dress involves distinctive packaging or appearance, such as a particular color and style of uniform for servers at a chain of restaurants (e.g., Hooters). It does not extend to a functional part of a product, for which, instead, patent protection may be available.

Trade dress concerns the "look and feel" of products and of service establishments. This includes the size, shape, color, texture, graphics, and even certain sales techniques of products. This has been applied to many products such as teddy bears, luggage, greeting cards, romance novels, and folding tables.

The U.S. Supreme Court supported a trade dress claim made in the 1992 case, *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763. One Mexican-style restaurant could not copy its competitor's decor, which included distinctive exterior decorations and interior design. Trade dress that is "inherently distinctive" is protected under the Lanham Act and by common-law principles concerning unfair competition. Similarly, in *Qualitex Co. v. Jacobson Products Co.*, 513 U.S. 159 (1995), the U.S. Supreme Court noted that "Color alone can meet the basic legal requirements for use as a trademark." The color of a product can be trademarked when it acts as a symbol to distinguish one brand from others.

An overlap between patent law and trade dress law is demonstrated when a former design patent tends to undermine a present trade dress claim. In *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23 (2001), Marketing Displays of Framingham, Michigan made and sold road signs (e.g., "Road Work Ahead") with a patented dual-spring mechanism that kept them upright during windy conditions. After the patent expired, TrafFix Devices of San Clemente, California began selling signs with the same device. Marketing Displays sued TrafFix Devices for, among other things, trademark and trade dress infringement. But the claim of unlawful copying of appearance or packaging involved the dual-spring mechanism that allows roadside signs to pop back up on windy days. So, in the TrafFix Devices case, the U.S. Supreme Court unanimously ruled that the existence (or former existence) of a company's design patent provides "strong evidence" that the design was functional and therefore not entitled to trade-dress protection. For the Court, Justice Anthony Kennedy wrote, "Where the expired patent claimed the features in question, one who seeks to establish trade-dress protection must carry the heavy burden of showing that the feature is not functional." The effect of the decision is to deter patentholders, such as for durable consumer goods, from obtaining protection for the look of an invention and, therefore, extending intellectual property rights in the invention beyond the life of the patent. (Remember: patents have a finite term, while trade dress (in effect, a type of trademark) has an indefinite duration.)

In late August 1998, the U.S. Patent and Trademark Office began allowing free searches of its trademark database, including both trademarks and trademark applications. The database can be accessed through the agency's website.

Knockoffs

Knockoffs are outright theft of intellectual property; pretending that something is the authorized product, when it is not. Is it really an authentic Rolex watch? Is it an authorized copy of a movie, or is it a pirated version?³ Not only are there possible actions for fraud, breach of contract, or intellectual property infringement, but counterfeit products may have defects for which a product liability action may be brought. For example, knockoff toys may be unsafe, car replacement parts may not perform properly, and supposedly “designer” shampoo could actually cause hair loss!

What one may save in money with a counterfeit product one will almost certainly give up in quality. In addition, counterfeit products almost never come with guarantee. And, in worst-case scenarios, such as with bootlegged music CDs or movie videos, even the purchaser, not just the counterfeit item’s producer or seller, may face legal action.

Sleaze E-Commerce

The Internet has become designer labels’ worst enemy. Online shopping involves an estimated \$100 billion (or more) of “cyberfakes.” And, of course, much of the fakery concerns computer software. Large entities such as Microsoft Corporation devote substantial resources pursuing piracy. For example, from November 2000 to April 2001, Microsoft brought, or had authorities file, criminal charges and lawsuits in 20 countries; had 47,000 “takedowns” of counterfeit sales on the Web; and – in the space of a year, seized five million units of counterfeit Microsoft programs, valued at \$1.7 billion.

A Dramatic Example: THE GENUINE ARTICLE – BIGBABY BEANBAGS

Writer Ripley, looking very artistic (e.g., wearing a beret), is asleep, sucking his thumb. He awakens, disturbed by nasty, nightmarish images. . . of Knockoffs and Palming off.

Ripley’s monologue:

What a dreadful dream! I am disturbed by nasty, nightmarish images of knockoffs and palming off. In such a plagiarizing place, what would become of the artists, of the scientists and composers and writers? I must exercise effective control over my creations. If there were no legal protection for my work, as an author, what would become of me?

And what of my fine, fair, faithful family?

Curses to those who would steal my work!

I have passed along, to the next generation, my concepts of consuming honesty; my children are good and true consumers, always getting the genuine article.

For instance, Authentic quote Ragtag Wigzag Zigzag Big-baby-Beanbags. Not those Rip-off Toys [picks up some beanbags; rips or breaks a beanbag to emphasize the cheapness; then exclaims] Oh, [sarcastic] isn’t this special! Where did these come from? Oh yes, Gifts, from other consumers - friends and relatives who are, shall we say, undiscerning, or . . . just plain cheap.

We only get the Genuine Article. The kids have made a Ragtag Wigzag Zigzag Big-baby Beanbag Trail!

But how many babies are there? And how much will they cost?

There are too many! Too many!!! When will the insanity end?! [throw some beanbags]

Hundreds and hundreds of zigzaggin’, wigwaggin’ baby-bags, purchased by Happy Little Ripleys.

The Trail of Babies Never Ends! It runs round the house. It rolls across our yard.

It gallops throughout the entire neighborhood! These Babies mock me.

[drops to knees and screams]

Why oh why oh why!!! [freezes and says, as looks at mailbox]

Oh, No! Will the mail scorn me, too? Has the Big-baby Beanbag Bill come in?

[seeing a bill]

Yes. [opening the bill and reacting] No!

Six hundred and fifty-eight Genuine Ragtag Wigzag Zigzag Big-baby-Beanbags! Thousands and thousands of dollars gone with the wind. Why they’re just silly little beanbags! Ten cents worth of plastic “beans” and some cloth! Oh, the power of American companies, and American marketing and American

¹ There are several ways to determine whether a product is a counterfeit or “the real deal.”

- Trust your instincts. If an item’s price is well below the usual or “standard” retail price, it may be a counterfeit. If you have any doubts, simply walk away
- Check out the trademark and labeling. Are any words misspelled? Are letters blurred? Does the item tag have a rip in it? These are some of the telltale signs of a counterfeit.
- Packaging on a legitimate product should bear the manufacturer’s code and copyright information. The printing should be crisp, not faded or blurry.
- Carefully examine the product. It should stand up to the material standards it promises.

know-how, selling us American goods – all, of course, made in China.
It seems that every one of this bill's 658 beanbags sold for a premium - no discount here cause these babies are the Genuine Article!

MORAL: Being ethical can be costly. How many people put their money where their ethics should be?

BLONDE TO BLONDE – Transcript of Video Skit

The Playwright urges everyone: Please, Just Say No to Knockoffs.

With that in mind, RWE Legal Eagle Flicks presents:

BLONDE TO BLONDE: FIFI AND SHARI DISCUSS BOGUS HANDBAGS

Two Little Rich Girls are Disturbed by Knockoffs & Palming Off!

Shari: Hey, Fifi, is that a new purse?

Fifi: Oh, hey, Shar...yeah, it sure is!

Shari: A Real one?

Fifi: Well, what else? Like I would really carry a knockoff!

Shari: Or a palming off!

Fifi: Oooh! That's, that's kind of gross, Shari. Don't you think that's a little inappropriate?

Shari: Oh, you know, like a Gucci purse that's not really a Gucci. But a good enough imitation that until you look at it close up you might think it's a Gucci?!

Fifi: Oh, oh, oh, oh, oh, like the one my roommate had last year. Ya, okay, hmm... that was really tacky. Ya, never trust roommate matching. Anyway, I'm glad that I buy Louis Vuittons.

Shari: Those could be palmed off, too, Fifi.

Fifi: But, are you sure? How? I, I don't get it.

Shari: Let's just say your Louis Vuitton purse, instead of saying letters "LV," it says "LW." And let's look close at the quality of the stitching and the grade of the leather used.

Fifi: Well, okay. (Showing purse) No! Shar, what does that look like to you?

Shari: Sorry, Fifi. It looks like a "W" to me. [Holding Fifi's purse now] Come to think of it, the leather doesn't feel so hot, either – kind of like vinyl.

Fifi: You know Shar, I know we're BFF [Best Friends Forever] and everything, but I'm really sick of you ridiculing my purse! [grabs purse back from Shari; the purse falls apart]. Oh my gosh! Look what you did! I mean. . . oh! Could this day get any worse?

Shari: Don't blame me, Fifi. You're the one who bought the fake handbag!

Fifi: It's just - I don't understand how this could have happened. I mean, the sidewalk vendor... he just, he seemed so nice. I mean . . .

Shari: Well, how much did you pay for it?

Fifi: Well, I, I paid, I only paid 50 dollars. But, I mean, he threw in a wallet [he should have thrown in a hot dog!] and everything!

Shari: For an authentic Louis Vuitton purse?

Fifi: Uh huh, uh huh. Well, see, he knows, the guy whose, whose brother's sister's cousin, I think, maybe mows the, the yard of Louis Vuitton, or, maybe his mom. I don't know. I mean, but he said I was getting a really, really good deal. I believed him!

Shari: Oh, did he!

Fifi: [Nodding] Uh huh.

Shari: And what would become of the artists, of the design innovators, and the leather engineers, and the handbag scientists if everyone bought a fake Louis Vuitton.

Fifi: I don't know . . .

Shari: They'd be out of a job.

Fifi: But *even worse*, Shar - I'd have a knockoff for a purse.

Shari: And, without strong legal protection, all those high-quality purse producers may have to shut down production lines. Think: all those high quality purses—gone! All the trendy looks – gone!

Fifi: I guess you're right. You mean, no more Dooney & Bourke? No more Fendi? No more Louie? Or Gucci? No Prada?!

Shari: Right.

Fifi: Oh no! What would we do?

Shari: It'd be awful.

Fifi: The world would be such a deh, dee, dee-soleet?

Shari: Desolate.

Fifi: Desolate place, without a pretty purse to call my own.

Shari: It would - so lonely, so ugly. You might as well buy your next purse at Wal-Mart.

Fifi: Shar, don't even, don't even say that. That is just *terrifying*. Hmmm. Who'd have thought - Wal-Mart?! Huh, anyway, you know, I just don't see why everyone can't just be an ethical consumer. Why can't everyone, everyone be like me?

Shari: Huh? Like you?! You're the one who bought the fake handbag.

Fifi: Oh yeah, well, I guess you're right. Hmm. You know, I'm going to take this purse back. Right now. No more Rip-off retail for me!

Shari: But how are you going to get your money back?

Fifi: Well, I hadn't really thought about that. You know, I haven't really thought much about anything lately, Shar. But uh

. . .

Shari: I can see that.

Fifi: You know, I think I'll ask Mr. Louis Vuitton. I hear he's really, really nice. Even if he is French.

Shari: I don't think Louie himself is gonna get involved, Fifi. Unless, maybe, you lead him to the people in charge of all this palming off!

Fifi: That's what I'll do! Hmmm. What has become of the fashion world of America today?! I, I just don't know.

Shari: It's shameful.

Fifi: It's so shameful.

Shari: It's awful.

Shari and Fifi: Mmmmm.

Shari: At first, some palmed-off purses may seem pretty. [Shari and Fifi wistfully admire the purse.] But [tossing away the palmed-off purse], the end-result can be just downright UGLY!!

THE END