Legal Issues in Counter Brand Work: A Critical Update for Activists

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A Business Ethics Network Webinar
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If you have any questions please email them to: benquestions@corpethics.org

This webinar will be recorded.
Legal Issues In Brand Activism:
A Critical Update
Copyright

Trademark

Publicity Rights

Defamation
Copyright Basics

What is a copyright?
• Exclusive rights granted to authors in original expression:
  – To reproduce a work
  – To create derivatives
  – To distribute copies of the work
  – To publicly display or perform the work

How do you infringe a copyright?
• By doing any of the above without the permission of the copyright holder
But there are limits, e.g., fair use

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the original work as a whole; and
4. the effect of the use upon the potential market for the original work (e.g. licensing).

Courts can consider other factors, esp. public interest
Challenge for Activists: Online speech depends on intermediaries
DMCA “Safe Harbors”

17 U.S.C. 512

Eliminate Monetary Damages

Limit Injunctions
To stay in safe harbors, ISP must:

- Be the right kind of service provider
- “Expeditiously” take down material if compliant notice
- Restore only after counter-notice and
- 10-14 days to file suit

- (plus some other things)
After Takedown: User Options

• Counter Notice (back up in 10-14 days)

• Sue under 17 U.S.C. 512(f):

“Any person who knowingly materially misrepresents under this section (1) that material or activity is infringing . . . shall be liable for damages, including costs and attorneys’ fees, incurred by the alleged infringer”
Stephen Colbert on Truthiness: http://www.youtube.com/watch?v=sNHqX27hiz8
Trademark: The Other Fair Use Front

• What is protected: words, symbols, colors, etc. used in commerce to designate the source of goods and services

• *Infringement*: using a mark so as to cause likelihood of confusion as to source

• *Dilution*: blurring or tarnishing nationally famous mark
Noncommercial Use

“[T]rademark infringement law prevents only unauthorized uses of a trademark in connection with a commercial transaction in which the trademark is being used to confuse potential customers”  *Bosely Med. Inst. v. Kremer*

“The Lanham Act regulates only economic, not ideological or political, competition . . . Competition in the “marketplace of ideas” is precisely what the First Amendment is designed to protect.”  – *Koch v. Does*

“The Lanham Act . . . only regulates commercial speech . . .”  *Taubman v. WebFeats*
Nominative Fair Use

• The markholder’s product or service in question is not readily identifiable without use of the trademark;

• Only so much of the mark or marks was used as was reasonably necessary to identify the product or service; and

• The user did nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.
First Amendment Balancing

• Lanham Act applies “to artistic works only where public interest in avoiding consumer confusion outweighs public interest in free expression.” *Mattel v. Walking Mountain Prods.*

=>

• Trademark relevant to message?

• Misleading as to source or content of work?
Why Free Inhalers? Because COAL CARES.
For an OSP,
Any trademark claim =
time + money + risk
IRAQ WAR ENDS

Troops to Return Immediately

BY JUDGE SHERMAN

Operation Iraqi Freedom and Operation Enduring Freedom were brought to an unannounced close today.

Comments (263)

Streets Come Alive as Relief and Exuberance Greet End of Conflicts

BY SCHUYLER FRANK

Thousands took to the streets to celebrate the announced end to the wars in Iraq and Afghanistan.

Comments (13)

AFTER THE WAR

- Last to Die in Battle
- Remembered, American and Iraqi
- Torture, Rendition "Not Such Good Ideas After All"
- War Brides (and Husbands) Find Their Place in a New Iraq

U.S. Army helicopters begin moving troops and equipment from Saddam Hussein's former Baghdad palace. (COURTESY ARMY MIL)

Ex-Secretary Apologizes for W.M.D. Scare

300,000 Troops Never Faced Risk of Instant Obliteration

BY FRANK LARIMORE

Ex-Secretary of State Condoleezza Rice reassured soldiers that the Bush Administration had known well before the invasion that Saddam Hussein lacked weapons of mass destruction.

Comments (73)

Court Indicts Bush on High Treason Charge

BY BARRY GARSON

Grassroots advocacy is the source of sweeping legislation, study says.

Comments (24)

Your purchase of a diamond will enable us to donate a prosthetic for an African whose hand was lost in diamond conflicts.

De Beers From her fingers, to his.
Publicity Rights

• Potential violation if: you have used someone’s name or likeness to your commercial advantage, without consent (broader in CA)

• Defenses vary a bit, but basically same as trademark (e.g. First Amendment, noncommercial)
Bieber arrested

Just after 3pm PST, Bieber tweeted "OMG— cops at house, want to arrest the bieber: those neyo songs PLS RT!!"

By 3:12pm, a now-routine "online singing" arrest had become a teenage riot. A SWAT team was deployed to extract Bieber from throngs of small but enraged fans.

Help Keep YouTube Free.
Please Take 10 Seconds to Sign Our Petition and Stop This Bill.
Defamation

• Defamation: false and unprivileged statement of fact that hurts someone’s reputation, and is published as a result of negligence or malice.
• Trade Libel: intentional + direct negative effect
• Libel is a written defamation; slander is a spoken defamation
If you are the speaker: Principal defenses

- Truth
- Opinion/hyperbole
- Public Figure
- No $$$ damage (trade libel)
Not defamatory:

• Calling a political foe a "thief" and "liar" in chance encounter
• Calling a TV show participant a "local loser," "chicken butt" and "big skank"
• Calling someone a "son of a bitch"
Defamatory

- Charging someone with being a communist (in 1959)
- Calling an attorney a "crook"
- Describing a woman as a "call girl"
- Accusing a minister of unethical conduct
- Charging someone with being a communist
But what if you don’t have a lawyer to lay out your defense?
Some practical advice.

(Note: IAAL, but IANYL)
• Be noncommercial.
• Don't use mark alone in a domain name.
• Have a prominent disclaimer.
• Find a service provider with backbone.
• Be ready with alternative site
• Take only what you need.
• Show your work: link/cite sources
And if that doesn’t work
Contact EFF!
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