Class 17: Survey Evidence, Post-Sale Confusion, and Reverse Passing Off
Class Outline

• Consumer Surveys For/Against Confusion
• Different Types of Confusion:
  • Palming/Passing Off
  • Sponsorship
  • Reverse Sponsorship/Passing Off
  • Point of Sale
  • Initial Interest
  • Post Sale
I love WAL-OCAUST
They have FAMILY VALUES
and their
ALCOHOL, TOBACCO
and FIREARMS
are 20% OFF

WAL-QAEDA
Freedom Haters ALWAYS
“Proof of actual confusion is considered the best evidence of likelihood of confusion.”

Trustworthy Survey Criteria

1. The ‘universe’ was properly defined,
2. A representative sample of that universe was selected,
3. The questions to be asked of interviewees were framed in a clear, precise and non-leading manner,
4. Sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted,
5. The data gathered was adequately reported,
6. The data was analyzed in accordance with accepted statistical principles, and
7. Objectivity of the entire process was assured.
Types of Confusion

1. Actual Confusion
2. Initial Interest Confusion
3. Post-Sale Confusion
4. **Palming (Passing) Off**: Confusion over source or origin between directly competing goods
5. **Sponsorship or Affiliation Confusion**: Among unrelated goods, where the similarity of TM erroneously suggests a connection between the sources – usually a junior user seeking to profit from senior user’s goodwill
6. **Reverse Confusion**
   a) **Reverse Sponsorship**: Like regular sponsorship (unrelated goods), but where larger junior user overwhelms smaller senior user causing senior user to lose value of its TM
   b) **Reverse Passing Off**: The same concept in the context of competing goods
Actual/ “Point-of-Sale” Confusion

When a customer is misled, up to point of purchase, as to the source of manufacture of the product.
Initial Interest Confusion

• When a manufacturer improperly uses a trademark to create initial interest in the product, even if the customer realizes, prior to purchase, that the product was not actually manufactured by the trademark holder.

• Applies when allegedly improper use of a trademark attracts potential purchasers to consider products or services provided by the infringer.
TRADMARK
PRINCIPAL REGISTER

GIBSON GUITAR CORP. (DELAWARE CORPORATION)
P.O. BOX 10087
641 MASSMAN DRIVE
NASHVILLE, TN 37210

FOR: GUITARS, IN CLASS 15 (U.S. CL. 36).
FIRST USE 12-0-1952; IN COMMERCE
12-0-1952.
THE LINING OF THE DRAWING IS NOT INTENDED TO INDICATE COLOR.

THE MARK CONSISTS OF A UNIQUELY SHAPED CONFIGURATION FOR THE BODY
PORTION OF THE GUITAR AS ILLUSTRATED IN THE DRAWING BY THE SOLID LINES.
SEC. 2(F).
MARY FRANCES BRUCE, EXAMINING ATTORNEY
Gibson Les Paul

PRS Singlecut

Headstock
Fret Board
Horn
Wow Wee Paper Jamz Guitar Series I - Style 1

Priced at $29.60

Sold by RetroShack
04 Bonanza transactions
98.5% positive rating

Add to Cart

Add to wish list

Ask seller a question

Experienced Seller

Payment options
Credit or debit cards,
Paypal, Money Order

Shipping options
$5.49 via Economy shipping (1 to 10 business days) to United States
Get it by October 23rd*

Purchase protection offered

Got one like this to sell? Sell it on Bonanza!
Post Sale Confusion

• When use of a trademark leads individuals (other than the purchaser) mistakenly to believe that a product was manufactured by the trademark-holder.

• Applies when allegedly improper use of protected trade dress on a lower-quality product diminishes the reputation of the holder of the rights to that trade dress.
Pontiac Fiero

1972 Ferrari Daytona Spyder
Post sale confusion requires an inferior product

Roberts kit on a Pontiac Fiero…or is it a 1972 Ferrari Daytona Spyder??
Initial Interest Confusion v. Post-Sale Confusion

**INITIAL INTEREST CONFUSION**

- Similarity of mark attracts consumer attention
- Confusion is dissipated before purchase
- What’s the harm?

**POST-SALE CONFUSION**

- Consumer knows goods are not genuine
- Third parties think the item was made by the TM owner
- What’s the harm?
“Passing Off” (aka “Palming Off”)

When a producer misrepresents his own goods or services as someone else’s.
“Reverse Passing Off”

When a producer misrepresents someone else’s goods as his own.
Dastar Corp. v. Twentieth Century Fox
[No Title]