

Trademark Law

Prof. Madison

Today: Novel theories of confusion

Key concepts from Class 18:

Was that fun? Interesting? Challenging? Useful?

Creative, recently developed “confusion” theories

other than confusion as to source at or near the point of sale. Trademark owners will trademark-own. Are these real? If so, are they forms of “irrelevant confusion”?

- 1. Initial interest confusion:** The defendant’s (junior) use of the mark attracts consumers to the defendant’s goods/ services, but any resulting confusion is dispelled before the consumer buys anything.
- 2. Post-sale confusion:** The defendant’s (junior) use of the mark confuses non-purchasers as to the source of the mark (which has been copied without permission), rather than the source of the good or service.

Trademark Law

Today (under the Lanham Act, building on the Restatement of Torts and Restatement of Unfair Competition), older unfair competition concepts and older technical trademark concepts are blended:

1. Section 32 (registered marks):

(1) Any person who shall, without the consent of the registrant —
(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark **in connection with the sale, offering for sale, distribution, or advertising of any goods or services** on or in connection with which such use is **likely to cause confusion, or to cause mistake, or to deceive**; ...

2. Section 43(a) (unregistered distinctive marks, unfair competition):

(a) (1) Any person who, **on or in connection with any goods or services, or any container for goods, uses in commerce** any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—(A) is **likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person**, ...



Is “Wagner’s Drive-In” liable for trademark infringement? **Who might be confused? Who might be harmed? How?**

Does trademark law protect producer goodwill or consumer choice? Are these in conflict?

Compare the contract law doctrine of unconscionability: when do we protect consumers from themselves? [Answer: rarely.]

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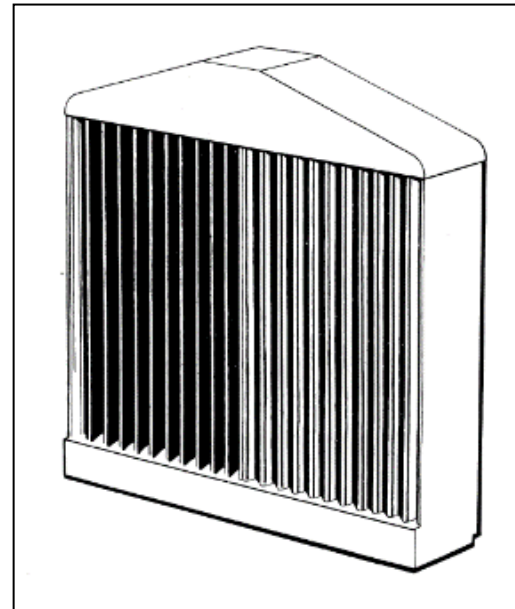


Select Comfort Corporation v. Baxter (8th Cir. 2021)

Bad faith? Free riding on the goodwill of the plaintiff's mark? Bait and switch tactics? Or competing for the business?



Rolls-Royce Motors, Ltd.
v. Custom Cloud Motors,
Inc. (S.D.N.Y. 1976); Rolls-
Royce Motors Ltd. v. A&A
Fiberglass, Inc. (N.D. Ga.
1977)





Who might be confused?

Who might be harmed?

How?

Does selling the
“Faux-rrari” constitute
“post-sale” confusion?

Or dilution (nb no
dilution statute at this
point)?

Is the deft offering
competitive goods, or
not?

Is the deft acting in bad
faith?

**Ferrari S.P.A., Esercizio v.
Roberts
(6th Cir. 1991)**



Nike sneakers (left) & Warren Lotas sneakers (right)

Lotas makes “artistic” versions of the older Nike “Dunk” – which are rare, expensive collectibles.

The word “Nike” is absent; the modified “Swoosh” has a hockey mask on it.

Did Lotas “undermine the DNA of sneaker culture”?

