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## MULTI TIME MACHINE, INC. V. AMAZON.COM

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In the recent case of Multi Time Machine, Inc. v. Amazon.com, the 9th Circuit Court of Appeal reversed the District Court's summary judgment in favor of online retailer Amazon.com ("Amazon") in a trademark infringement action brought by Multi Time Machine, Inc. ("MTM") under the Lanham Act. The Court held that a jury could find that Amazon had created a likelihood of confusion under an "initial interest confusion" theory by responding to search requests for MTM Special Ops watches by showing MTM's trademark three times above the search results, and displaying similar watches manufactured by MTM's competitors beneath.

Facts:

MTM manufactures, among other things, high-end, military-style "MTM Special Ops" watches, and owns a registered trademark for "MTM SPECIAL OPS." Amazon.com, who claims to offer the "Earth's Biggest Selection of products," does not carry MTM watches.

In its complaint, MTM alleged that Amazon infringed its trademark by responding to search requests on its website with a results page displaying the "MTM SPECIAL OPS" trademark three times, above a display of aesthetically and functionally similar watches manufactured by MTM competitors. Customers could not purchase watches from the search results page, but had to click through to an Amazon "product detail" page. On the top of the product detail page, the customer's initial query "MTM Special Ops" still appeared in the search field. Nothing on either of the pages indicated that Amazon does not carry MTM products. However, the search results of the Amazon website produces a list, with photographs, of several other brands of military-style watches that Amazon does carry, specifically identified by their brand names.

On Amazon's motion, the District Court granted summary judgement in favor of Amazon finding that the competitor's itemized products were clearly labeled and there was no evidence that Amazon users were likely to be confused as to the sources of the competing goods.

9th Circuit Analysis:

Trademark infringement occurs when a defendant uses a mark in commerce in a manner likely to cause confusion as to the source of goods or services. A defendant can create a likelihood of confusion, and thereby cause infringement, through a type of confusion referred to as “initial interest confusion.” Initial interest confusion occurs where a consumer is confused, not at the time of purchase, but earlier in the shopping process, if the customer confusion creates initial interest in a competitor’s product.

The 9th Circuit held that a jury could find that Amazon had created a likelihood of confusion under the initial interest confusion theory because users may be confused as to why they only received search results showing the competitor’s products, and may wonder whether a competitor has acquired MTM or is otherwise affiliated with or approved by MTM. The issue is not whether a buyer may purchase some brand other than MTM (mere diversion is not enough) but, instead, whether Amazon’s use of the MTM mark would cause initial interest confusion by attracting potential customers’ attention to buy infringing goods because of MTM’s hard-won reputation. “Even though his confusion may be dispelled before an actual sale occurs, initial interest confusion impermissibly capitalizes on the goodwill associated with a mark and is therefore actionable trademark infringement.”

Conclusion:

While the 9th Circuit clearly states that it is “by no means certain that MTM will be able to prove likelihood of confusion under and initial interest theory,” there are genuine issues of material fact. Consequently, the Court reversed the judgment of the District Court, and remanded the action to the District Court for further proceedings.

This Blogger’s Reflections:

In some respects, the 9th Circuit appears to be stretching the bounds of what constitutes actionable infringement by finding a genuine issue of fact regarding the likelihood of confusion when none appears to exist because MTM’s competitor’s products were clearly labeled. It seems highly unlikely to this trademark attorney that sophisticated consumers, making relatively expensive purchases, would be confused as to the source of the competitor’s watches. If the consumer had doubts as to the source, the sophisticated consumer would investigate further as to MTM’s status and affiliations, or at minimum, search other sites for MTM watches.

On the other hand, and in contrast to Amazon’s competitor’s Buy.com and Overstock.com who both clearly state that no search results match “MTM Special Ops,” Amazon makes no clear representation, which caused the 9th Circuit to focus on Amazon’s intent. Because it appears that Amazon is attempting to capitalize on the

goodwill associated with MTM's trademark, to the detriment of MTM and, perhaps, Amazon's competitors, the end result reached by the 9th Circuit (that the action against Amazo proceeds) may be the fair result. In any case, MTM will no doubt have a difficult road ahead in attempting to prove consumer confusion with their competitor's products clearly labeled as such.

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