

Unintended Consequences of Fair Use under HR 683: the Trademark Dilution Bill. Practical Examples

Problem:

Many users of a trademark do not comment on the trademark holder or on its product, but HR 683 would open up such a user to lawsuit. Commercial users may be able to afford litigation, but non-commercial users cannot.

This is not a theoretical problem and is common place for artists today.

Artists:

- Volkswagen demand letter to artist Don Stewart (see attached letter)
- Andy Warhol's painting of Campbell's soup cans. Only once Warhol became famous was he able to get permission to use such famous names. Should a struggling artist be put to that task? (see attached letter).

Photographers:

- *"During my tenure at ASMP we experienced a number of cases in which corporations attempted to use trademark law to prevent the publication of a photograph,"* wrote Richard Weisgrau, former Executive Director of the American Society of Media Photographers citing Photo of Rock and Roll Hall of Fame Case. (http://www.stockphotographer.info/images/stories/Richard_Weisgrau/letter_to_senator_hatch.pdf)
- *"Photographers often receive cease and desist letters and other threats from trademark owners in connection with photographic uses of trademarks and similarly protected rights"* said Victor S. Perlman, General Counsel and Managing Director American Society of Media Photographers, Inc. (ASMP) in a letter dated Feb. 7, 2006. (<http://www.asmp.org/news/spec2006/HR683letter.php>)

Political Speech:

- ACLU's famous pizza order video. If instead of using the generic company name, Pizza Palace, the ACLU had put Domino's logo in the video as an embodiment of takeout pizza. The purpose of the video is not to comment on Domino's but rather on growing assault on privacy. (<http://www.aclu.org/pizza/>)

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Example:

Explanation:

1. “McDreamy” from *Grey s Anatomy*



“McDreamy” is the nickname of a character in the popular ABC television show *Grey s Anatomy*. McDonald’s restaurants have vigorously litigated users of “Mc.”

2. “Google Drinking Its Own Koolaid?”



Headline of a blog expressing concern over the search engine’s policy in China, with the use of Kraft’s trademark: “Koolaid”

3. “Martha, you're fired!”



Title of webpage discussing the cancellation of a Martha Stewart television show which uses Donald Trumps’ trademarked: “Your Fired.”

4. Mondale asks “Where’s the Beef?!”



During a political debate against Gary Hart, Walter Mondale asked “Where’s the Beef?!” which was a Wendy’s Trademark.

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5. Don Stewart Artwork



Volkswagon sent a cease and desist letter to an artist who drew an image of a VW Beetle comprised of insects. Volkswagon claims ownership in the shape of the VW Beetle as tradedress.

6. flickr.com photos that contain another's trademark



Thousands upon thousands of amateur photographers post their images to flickr.com. Many of these pictures contain another's trademarks without specifically commenting on the marks themselves.

7. Photography that incidentally includes trade mark / dress



Photographer captures an image of homeless person's possessions, with a Cadillac in the background.