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claimant asserting a monetary claim to obtain a person's consumer report without violating the FCRA. Rejecting this assertion, the court explained that a monetary claim is distinguishable from collecting a debt because the latter involves a credit transaction.

Third, Korotki argued that ASC could have obtained the additional address at which to serve Korotki by running a less intrusive credit check. Again, the court rejected this argument, noting that the FCRA does not limit an authorized user's access to credit information.

Finally, the court rejected Korotki's argument that the acquisition of his credit report was frivolous because the notice period for the mechanics lien had expired. The court held that Schmitt acted reasonably in his client's interest and that Korotki failed to present any evidence of bad faith.

In addition to his claim under the FCRA, Korotki brought state law claims pursuant to the CCRAA and common law invasion of privacy. With respect to Korotki's CCRAA claims, the court found that the FCRA and the CCRAA are virtually identical. Thus, given the court's dismissal of the FCRA claim, the court concluded that the defendants did not violate the CCRAA either. Finally, with respect to Korotki's claim of invasion of privacy, the court held that because the FCRA authorized the defendants' actions, a finding of an invasion of privacy would be inconsistent with the FCRA, and thus, preempted by the FCRA.

Batch code obliteration violates trademark and unfair competition laws by causing "likelihood of consumer confusion"

by Catherine Moore

In ***John Paul Mitchell Systems v. Pete-N-Larry's Inc.*, 862 F. Supp. 1020 (W.D.N.Y. 1994)**, the Federal District Court for the Western District of New York found that a retailer's obliteration of batch codes from bottles of hair care products resulted in consumer confusion sufficient to constitute a potential violation of the Federal Trademark Act of 1946 and New York's unfair competition laws.

Hair care products sold without authorization

John Paul Mitchell Systems ("JPMS"), the manufacturer of the Paul Mitchell line of hair care products, authorizes the distribution of its products exclusively to professional hair salons and stylists. JPMS limits product availability to ensure that consumers have the opportunity to seek professional advice for questions concerning the appropriate selection and proper usage of Paul Mitchell products. JPMS maintains that the quality of its product suffers if consumers do not have access to professional consultations. Consequently, JPMS does not authorize the sale or distribution of Paul Mitchell products to retail stores.

The defendants, Pete-N-Larry's Inc. and several other retail stores, admitted that they sold Paul Mitchell products without authorization. The plaintiffs, JPMS and its regional distributor, alleged that the defendant retailers wrongfully obtained the products and physically obliterated the batch codes from the bottles "in concert with numerous, diverse, and unknown others." Batch codes are required by federal and state laws and are necessary to identify specific products in the event of a product recall. JPMS contractually prohibits its authorized distributors from selling Paul Mitchell products "to any person they know or have reason to suspect intends to sell the product to someone else."

JPMS further alleged that the defendant retailers denied access to professional consults to those consumers who purchased Paul Mitchell products. Additionally, JPMS contended that the defendant retailers failed to make such consumers the "conspicuously" aware that

JPMS does not guarantee Paul Mitchell products marketed by unauthorized sellers.

JPMS claimed that the retailers' unauthorized sale of Paul Mitchell products constituted: (1) violations of the Trademark Act of 1946, 15 U.S.C. § 1051 et seq. ("the Lanham Act"); (2) exposure to potential civil and criminal liability that also violated the Lanham Act; (3) unfair competition under New York law; (4) tortious interference with contracts; and (5) fraud. The defendants filed a motion to dismiss and a motion for summary judgment.

Damaged packaging creates consumer confusion

JPMS asserted that the defendants violated two provisions of the Lanham Act — § 32(1), 15 U.S.C. § 1114(1), for trademark infringement, and § 43(a), 15 U.S.C. § 1125(a), for false designation of origin or affiliation. In response, the defendant retailers argued that they could not have committed any trademark violations because they sold authentic JPMS products. The court determined that JPMS stated a claim under either Lanham Act provision provided that JPMS could prove consumer confusion as to the source of the products.

Courts have established two basic approaches for deciding whether goods that allegedly infringe a manufacturer's trademark violate the Lanham Act. Under the first approach, a material difference between the manufacturer's good and the alleged infringing good creates a presumption of consumer confusion. Under the second approach, the possibility of consumer confusion is not even considered if the alleged infringing good is a "genuine" product of the manufacturer.

In the present case, the court recognized that finding something to be "materially different" follows along the same lines as finding it not to be "genuine." However, the court explained that the two approaches are distinct and open to separate interpretations. The court reviewed several infringement cases in order to analyze past utilization of both approaches. These cases defined materiality and genuineness in a variety of ways. Since the court was considering summary judgment here, the court based its decision on the definitions most favorable to JPMS.

The court examined the First Circuit's approach in *Societe Des Produits Nestle v. Casa Helvetia*, 982 F.2d 633 (1st Cir. 1992), in considering whether a material difference existed between the goods authorized for sale by JPMS and the goods sold by the defendant retailers. In *Nestle*, the First Circuit defined a "material difference" as any discrepancy that impairs the ability of consumers to make informed purchases. Thus, minor changes made to products or packages are material differences because "it is by subtle differences that consumers are most easily confused." The *Nestle* court held that a "material difference" between the manufacturer's goods and the alleged infringing goods is the "linchpin" of liability under either § 32(1) or § 43(a) of the Lanham Act.

In the present case, the court also examined the analysis employed by the Fourth Circuit in *Shell Oil Co. v. Commercial Petroleum, Inc.*, 928 F.2d 104 (4th Cir. 1991). The court in *Shell Oil* determined that authentic products are not necessarily genuine products. Although courts reached similar conclusions in other infringement cases, *Shell Oil* focused on product "genuineness" as a threshold question. Under the *Shell Oil* framework, a finding that a product is not genuine results in a possibility of consumer confusion. The *Shell Oil* court held that a product is not "genuine" unless it is "distributed under quality controls established by the manufacturer." In light of these definitions, the court in the present case found that summary judgment was not warranted under either the materiality or genuineness approach, assuming JPMS's allegations were true.

The physical changes made to the Paul Mitchell packaging influenced the court's decision more than the manner in which the retailers sold the products. For example, the court stated that it doubted whether the retailers' failure to offer professional consultations, standing alone, would amount to a material difference between the authorized JPMS product and that sold by the defendant retailers. However, the court found that the failure to offer professional consultations, combined with the eradication of batch codes, created a material difference likely to confuse consumers.

The court stated that the obliteration of the batch codes, which scarred the bottle and in many cases also erased some of the information written on it, interfered with JPMS's ability to control its product quality. Specifically, the court mentioned that one bottle had been punctured. In addition, the court found that the missing batch codes made it difficult to recall defective products. Although JPMS had never actually recalled any product, the court did not diminish the potential role of the batch codes in quality control. Accordingly, the court held that the products sold by the defendant retailers were, as a matter of law, materially different from JPMS products because the bottles had been substantially altered. Similarly, the court found that the crude removal of the batch codes resulted in a product that was not "genuine" under the *Shell Oil* analysis.

Consumer confusion violated more than the Lanham Act

The Lanham Act also formed the basis for the second claim. The court dismissed this claim not because it lacked merit, but rather because the court found it repetitious of the first Lanham Act claim. JPMS asserted that the batch code removal also erased the dates of manufacture. New York's Department of Environmental Conservation's Consumer and Commercial Products regulations, 6 N.Y.C.R.R. part 235, require all hairsprays sold in New York to be either marked or coded with a manufacture date. JPMS argued that consumers knew about this requirement and attributed the lack of a manufacture date to JPMS. As a result, JPMS claimed that the defendant retailers created a likelihood of consumer confusion which violated the Lanham Act by exposing JPMS to liability under the New York regulations.

Although the court noted that the possibility existed that JPMS could prove the violation, it dismissed the second Lanham Act claim because it involved the same statute, factual allegations, and theory of liability as the first Lanham Act claim. The court found that the second claim was not unique and concluded that it merely duplicated the first claim.

Similarly, the unfair competition claim closely paralleled the second Lanham Act claim. This claim also alleged that the defendant retailers exposed JPMS to liability by removing the manufacture dates. However, instead of alleging a Lanham Act violation, this claim alleged a violation of New York's unfair competition law.

The court found the unfair competition claim to be independent of the first Lanham Act claim because it was based on different law. Although distinct, the two claims were closely related because a likelihood of consumer confusion constitutes unfair competition under New York law. JPMS had already established that changes made to its product were likely to confuse consumers when it argued the first Lanham Act claim. Therefore, the court considered it unnecessary to reexamine the merits of those arguments in ruling on the unfair competition claim. Accordingly, the court denied the retailers' motion to dismiss and motion for summary judgment as to the unfair competition claim.

Insufficient evidence for breach of contract and fraud

The court dismissed the tortious interference claim because it found at least one of the requirements for tortious interference with contract lacking. The requirements include (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional procuring of the breach by the third party; (4) and damages to the plaintiff resulting from the breach.

The court found that JPMS did not prove that the defendant retailers procured the breach of any distribution contracts. The retailers submitted affidavits stating that they purchased the products from unauthorized sellers and that they never had any contact with authorized distributors or sellers. JPMS argued that even if the retailers did not directly procure a breach, they indirectly did so by purchasing Paul Mitchell products despite knowledge of JPMS's exclusive distribution network. However, the court proved reluctant to assign culpability to a party not directly involved in procuring a breach and found that the retailers could not be held liable for a breach essentially procured by another party. Consequently, the court dismissed the tortious interference claim.

Similarly, the court dismissed the fraud claim because JPMS failed to establish each required element of fraud. The elements of fraud are (1) misrepresentation; (2) concealment or non-disclosure of a material fact; (3) the defendant's intent to deceive; (4) justifiable reliance upon the misrepresentation by the plaintiff; and (5) injury to the plaintiff as a result of such reliance.

JPMS claimed that the removal of the batch codes constituted concealment because this act prevented identification of the authorized sellers who breached their distribution contracts. The retailers responded by submitting affidavits stating that they did not obliterate the batch codes from any JPMS products. JPMS argued that even if the retailers were not responsible for the obliteration, they knew that this action precluded JPMS from tracing the product to those parties responsible for the illicit distribution. However, the court held that the defendant retailers had no duty to disclose the missing batch codes to JPMS. As a result, the court held that JPMS presented insufficient evidence to prove concealment by the retailers. Accordingly, the court dismissed the fraud claim.

Conclusion

The court denied in part and granted in part the retailers motions for summary judgment and dismissal. The court found that the obliteration of the batch codes resulted in Paul Mitchell products materially different from JPMS authorized products. This caused a likelihood of consumer confusion regarding the origin of the Paul Mitchell products sold by the retailers. The court, therefore, denied summary judgment and dismissal on the first Lanham Act claim and the unfair competition claim. The court dismissed the second claim, but only because this claim proved too similar to the Lanham Act claim to form an independent claim. The defendant retailers were not the only ones involved in taking Paul Mitchell products out of the JPMS distribution network. Thus, JPMS could not establish that the defendant retailers instigated the unauthorized distribution or that they obliterated the batch codes. The court was unwilling to hold the retailers liable for mere awareness of such activities. Consequently, the court dismissed the tortious interference and fraud claims.

The statute of limitations of the Fair Credit Reporting Act is strictly construed

by Linda A. Kerns

Consumers seeking to file a claim under the Fair Credit Reporting Act ("FCRA") must strictly adhere to the statute of limitations unless their claim meets a narrowly construed discovery exception. In ***Clark v. State Farm Fire & Casualty Insurance Co.*, 54 F.3d 669 (10th Cir. 1995)**, the United States Court of Appeals for the Tenth Circuit affirmed the district court's holding that a "general discovery exception" to the statute of limitations would be contrary to Congress' express intention. To ensure a consumer's privacy, the FCRA provides limited circumstances where credit reports may be furnished and specified instances where consumers must be notified if their credit report is issued. The statute of limitations under the FCRA will only be extended if a credit report is issued, is required to be disclosed to the consumer, and contains a willful and material misrepresentation.

Credit report obtained without consumer's consent

The plaintiffs, Robert and Billie Clark ("the Clarks"), filed an action against State Farm Fire & Casualty Insurance Company ("State Farm") seeking actual and punitive damages. The Clarks alleged that State Farm violated the FCRA when it obtained the Clarks' credit report without their consent on July 25, 1989. State Farm procured the report in connection with a separate investigation which involved the alleged destruction by arson of a piece of property that the Clarks had sold to a third party.

Narrow exception in statute may extend tolling period

The Clarks filed their complaint on April 6, 1992, two years and eight months after the credit report was issued. State Farm filed a motion to dismiss, claiming that the statute of limitations had run. The FCRA requires that an action be brought within two years from the date on which the liability arises. However, a claim may be brought at any time within two years after the consumer discovers the report if the