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## Parody of Trademarked Products Subject to "Likelihood of Consumer Confusion" Standard

In *Nike, Inc. v. "JUST DID IT" Enterprises*, 6 F.3d 1225 (7th Cir. 1993), the United States Court of Appeals for the Seventh Circuit held that reasonable minds could disagree as to whether an individual's intended parody of Nike, Inc.'s trademarks would confuse consumers by leading them to believe that Nike sponsored the individual's product. Additionally, the Seventh Circuit determined that a parody is not an affirmative defense to a trademark infringement action, but merely one factor to be examined when determining whether an infringement actually occurred.

### *The "MIKE" Parody: an Unsuccessful Venture*

Nike manufactures and markets popular sports footwear, apparel, and related accessories world-wide. To identify its products, Nike developed the word "NIKE," a "swoosh" design, and the phrase "JUST DO IT" as its key trademarks. Nike has spent more than \$300 million in advertising over a 14-year period. As a result of its marketing efforts, Nike's trademarks are universally recognized, and have helped the company achieve sales exceeding \$10 billion since 1971.

Mike Stanard, an award-winning commercial artist, decided to market his first name, "MIKE," on T-shirts and sweatshirts as a takeoff of the "NIKE" logo. He formed "JUST DID IT" Enterprises to carry out this new venture. Stanard's purpose in undertaking the project was to create the appearance from a distance that the clothing read "NIKE" when in fact it read "MIKE." He viewed the project as a joke on Nike's image which has become a social phenomenon in recent years.

Stanard marketed the T-shirts and

sweatshirts to the general public, as well as college athletes and celebrities named Michael. He sold his products through a small mail-order campaign. Approximately two-thirds of those who ultimately purchased Stanard's products were named Michael. Nonetheless, despite Stanard's efforts, his "MIKE" project resulted in a financial loss.

### *Nike Fails to See the Humor*

Nike brought an action against Stanard in federal district court, alleging trademark infringement under the Lanham Trademark Act, 15 U.S.C. Sections 1114(1)(a) and 1125(a), which prohibit trademark imitations that confuse consumers. Trademarks consist of words or symbols which identify and distinguish products for the benefit of consumers. In order to establish a trademark infringement, the trademark's owner must present evidence of a valid trademark and must show the likelihood of consumer confusion.

Stanard argued that his humorous play on words deserved First Amendment protection as a fair use of Nike trademarks, claiming that he intended to create a parody. The court acknowledged that the First Amendment protects those who wish to ridicule businesses seeking public recognition through their trademarks. Such mockery may manifest itself in the form of parody which is defined as a close imitation of another's language and style for the purpose of comic effect or ridicule of the original. Stanard further argued that his attempt to parody Nike's trademarks was an affirmative defense to Nike's infringement allegations.

The district court rejected Stanard's arguments, finding that parody was not an affirmative defense, but merely another factor for the court to consider when determining the likelihood of consumer confusion. Accordingly, the district court granted Nike's motion for summary judgment, concluding that as a matter of law, the use of the word "MIKE" would cause con-

sumer confusion. Stanard subsequently appealed the district court's decision.

### *Determining the Likelihood of Consumer Confusion*

The Seventh Circuit agreed with the district court's determination that parody was not an affirmative defense to a trademark infringement action, but merely one factor in the analysis of confusion. Therefore, the primary issue before the court was whether Stanard's parody was likely to confuse consumers by leading them to believe that his products were in some way endorsed by or affiliated with Nike.

Traditionally, the courts have weighed a number of nonexclusive factors in determining whether a trademark imitation would be likely to confuse consumers. These factors include: (1) the degree of similarity in appearance and suggestion; (2) the similarity of the products; (3) the area and manner of concurrent use; (4) the degree of care likely to be exercised by consumers; (5) the strength of the complainant's trademark; (6) actual consumer confusion; and (7) the intent of the alleged infringer to pass off its products as those of another. Because neither Nike nor Stanard disputed the similarity of the products or the strength and validity of Nike's trademarks, the Seventh Circuit examined the remaining factors to determine the likelihood of consumer confusion.

### *The Trademarks' Similarity*

In addressing the degree of similarity between Nike's trademarks and Stanard's parody, the Seventh Circuit determined that a jury could find that "NIKE" and "MIKE" were not similar enough to confuse consumers. Although the court acknowledged that "NIKE" and "MIKE" were identical except for one letter, it noted that a successful parody required some duplication of the original. Consequently, the key was not whether the public would be confused by viewing

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the product from afar, but whether the consumer would be confused in purchasing the product.

The Seventh Circuit also noted that Stanard's company sold its products through mail order and required a customer to make a check payable to "JUST DID IT" Enterprises. Accordingly, the court found that for confusion to occur, a customer must not only see "MIKE" as similar to "NIKE," but must continue to confuse the two while making a check payable to "JUST DID IT" Enterprises.

### *Stanard's Intent in Producing "MIKE" Products*

The Seventh Circuit determined that a jury could reasonably find that Stanard intended to amuse consumers, not confuse them, by creating a parody of the "NIKE" trademark. The court maintained that parodies do not happen incidentally. Rather, a parody results from the actual knowledge of the trademark which the presenter, observer, and consumer possess. Stanard repeatedly admitted his awareness of Nike's trademarks and asserted that he only intended to mock Nike's image.

Additionally, the court concluded that the district court had erroneously based its decision on Stanard's statement that the whole point of the parody was to confuse observers viewing the shirts at first glance from across the room. The Seventh Circuit determined that the ultimate issue was whether a customer was confused when deciding to purchase an item, not whether a member of the general public was confused when viewing Stanard's product.

### *Additional Factors Considered*

The Seventh Circuit examined additional factors to determine the likelihood of consumer confusion. In reviewing the marketing channels employed by "JUST DID IT" Enterprises, the Seventh Circuit recognized that Stanard specifically targeted an audience who would appreciate the distinction between "MIKE" and

"NIKE." Accordingly, a jury could conclude that Stanard's target market would intentionally purchase a product with the "MIKE" parody, but not the "NIKE" symbol. The court reasoned that consumers' conscious decisions would tend to show that they were not confused as to whether Nike endorsed Stanard's products.

The Seventh Circuit also disagreed with the district court's conclusion that the price of Stanard's products suggested that consumers would not exercise a high degree of care in making their purchases. Nike failed to offer evidence as to the degree of care consumers would exercise in purchasing T-shirts and sweatshirts. The court concluded that absent such evidence, a jury could find that customers used care when purchasing T-shirts and sweatshirts with different labels.

Finally, the court found that because Nike failed to provide any evidence of actual consumer confusion, a reasonable jury could determine that Stanard's parody was not likely to confuse consumers. Consequently, the Seventh Circuit reversed the district court's grant of summary judgment for Nike and remanded the case for further proceedings. ♦

*Brian K. Wydajewski*

## Foreign-Language Warnings Not Required for Nonprescription Drugs

In *Ramirez v. Plough*, 863 P.2d 167 (Cal. 1993), the Supreme Court of California held that manufacturers of nonprescription drugs do not have a legal duty to include foreign-language warnings with their packaging materials.

### *Child Develops Reye's Syndrome*

The minor plaintiff, Jorge Ramirez, brought suit through his mother against Plough, Inc., claiming that he developed Reye's syndrome by taking St. Joseph Aspirin for Children (SJAC), a nonprescription drug manufactured by Plough. In March 1986, when Ramirez was less than four months old, his mother gave him SJAC to relieve cold symptoms. Ramirez's mother did not seek the advice of a doctor before using SJAC, although the label stated that for children under two, the dosage was "as directed by doctor." She gave Ramirez three SJAC tablets over a two-day period. When she took Ramirez to the hospital on March 15, the doctor recommended that she use nonprescription drugs that did not contain aspirin. Ramirez's mother, however, continued to administer SJAC. Ramirez then developed Reye's syndrome, resulting in severe neurological damage, including cortical blindness, spastic quadriplegia, and mental retardation.

Reye's syndrome is a disease that is fatal in 20 to 30 percent of cases, with many instances of permanent brain damage. The cause of Reye's syndrome is still unknown, but by the early 1980s, research demonstrated a link between the use of aspirin during a viral illness and the development of Reye's syndrome. These results led the Food and Drug Administration (FDA) to require a warning label on aspirin products to inform parents about Reye's syndrome. The FDA