

Pun Control: I Can't Go for That (No Can Do)

Whole Oats Enterprises v. Early Bird Foods & Co., LLC.

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Introduction

On March 4, 2015, *Whole Oats Enterprises* filed a complaint in the United States District Court for the Eastern District of New York against *Early Bird Foods & Co., LLC* (defendants). The plaintiffs (Daryl Hall & John Oates) allege the defendants used their name as a 'play on words' (Haulin' Oats) for the advertising, manufacture, and sale of their granola product (digitalmusicnews.com, 2015). Due to the subcultures that exist regarding the lives of celebrities in modern society, they have a significant influence on consumers and their purchases. The plaintiffs claim the defendants are capitalizing off their success, trading the plaintiffs' right of publicity in order to promote the defendants' granola product through trademark infringement. Trademarks are ubiquitous in today's society. Consumers and companies rely on them to distinguish one brand from another. Trademark infringement causes confusion among consumers, while restrictions can lead to censorship and a chilling effect in the media. This paper discusses some inconsistencies in current trademark law, calling for reform and clear guidelines that bring us into the 21st century. The paper will argue that *Whole Oats Enterprises v. Early Bird Foods & Co., LLC* is significant for protecting commercialization and right of publicity, as well as establishing a precedent for businesses and media practitioners using brand names and phrases that attempt to capitalize on another brand's notoriety. The significance of the court's decision could have major effects on the public discourse.

Facts of the Case

Whole Oats Enterprises (plaintiffs) is solely owned by Daryl Hall and John Oates. The duo are popular musicians using the registered trademark 'Daryl Hall & John Oates.' They are commonly referred to as 'Hall & Oates.' The plaintiffs claim common law rights to the trademark 'Hall & Oates.' Early Bird Foods & Co., LLC (defendants) produce a wide variety of granola products available online and in specialty stores. One of the individual products is named 'Haulin' Oats,' an obvious phonetic 'play on words' referring to 'Hall & Oates,' the musical group. Both parties are located in Brooklyn, NY. The plaintiffs claim the defendants are attempting to use the plaintiffs' fame and notoriety for financial gain by using a confusingly similar name and mark to sell granola. Another company based in Nashville, Tennessee has also been using the name 'Haulin' Oats' for the brand name of their company which produces oatmeal products. The dates each company began using the name has not been established. In 2014, the plaintiffs entered into a royalty agreement with the Nashville, Tennessee-based company after they learned the company had been using the name 'Haulin' Oats' for their brand. The plaintiffs claim that the Brooklyn, N.Y.-based company is creating confusion with the use of the name 'Haulin' Oats' for their product, while the Nashville, Tennessee-based company is using the name for their company's brand. Consumers are likely to believe that the plaintiffs endorse the product being manufactured and sold by the defendants. The plaintiffs are asking for: a) compensatory damages for injuries related to the alleged unlawful acts, b) for all profits to date related to the sale of the products and to cease using the name 'Haulin' Oats' for future sales, c) for all merchandise and materials related to the product to be destroyed, and d) for the defendants to pay all litigation expenses and attorney fees related to the case. The plaintiffs allege: a) trademark and service mark infringement, b) common law trademark and service mark infringement, and c) unfair competition on the part of the defendants (digitalmusicnews.com, 2015). The following cases are offered as precedent which present similar rulings on trademark infringement, as well as right of publicity: *Henley v. Dillard Department Stores* (1999), *Frisch's Restaurants, Inc v. Elby's Big Boy of Steubenville, Inc. (Boury Corp)* (1982), *Carson v. Here's Johnny Portable Toilets, Inc.* (1983), *Hormel Foods Corp. v. Jim Henson Productions, Inc.* (1995), *Gucci Shops, Inc. v. R.H. Macy & Co.* (1977), and *AMF Inc. v. Sleekcraft Boats* (1979).

Issues

There are two issues involved in the case that deserve attention: 'right of publicity' and 'trademark infringement.' They both deal with intellectual property rights, so overlap is inevitable. While the plaintiffs are not suing for right of publicity, it is important to consider to establish whether they are entitled to control the commercialization of their name. Right of publicity is considered an appropriation tort, along with commercialization. 'Appropriation' refers to "using a person's name, picture, likeness, voice or identity for commercial or trade purposes without permission" (Trager, et al., 2013, p. 725). Appropriation laws protect private citizens from commercialization as well as celebrities' and public figures' right of publicity. The right of publicity is described as the "inherent right of every human being to control the commercial use of his or her identity. Right of publicity is considered an intellectual property right, designed to protect the commercial interests of celebrities' identities" (rightofpublicity.com, 1999). Celebrities spend a good bit of time and energy establishing a public persona. It is unfair for businesses to play off the fame and fortune of a celebrity without providing compensation. The law protects the celebrity by requiring consent to use their name, picture, likeness, voice or identity for advertising or commercial use.

Intellectual property laws are important to inventors, media professionals, companies, and creative individuals for protecting their 'products of the mind' so they may benefit from the financial rewards. Intellectual property laws cover patents, copyrights, and trademarks. Patents protect inventions, copyrights protect the expression of ideas, while trademarks protect words and phrases. Trademark protection can include trademarks, service marks, trade names and trade dress (Trager, et al., 2013). A trademark is "a word, name, symbol or design used to identify a company's goods and distinguish them from similar products other companies make" (Trager, et al., 2013, p. 733). "The list of what can be trademarked is lengthy: letters, numbers, domain names, slogans, shapes, colors, sounds, smells" (Trager, et al., 2013, p. 617). A service mark protects services provided by a company, while trade names refer to a distinct company. Trade dress is the overall look, which includes size, shape, color, texture, fonts, and graphics. Each of these categories are protected to different degrees, but the trademark must be distinctive. Trademark laws were enacted to encourage creativity and eliminate confusion among consumers regarding company names, product names, slogans, titles, among other creations. There are both federal and state laws to protect consumers and companies from confusion about the source of a product (Trager, et al., 2013).

Trademarks can be very valuable to a company. The pervasiveness of logos, slogans, and trade names are apparent in advertising and through the marketing of goods and services. As a society, we are conditioned to respond to symbols and they have become a part of our culture. This can be a valuable tool for advertising and marketing professionals to establish an association between a consumer and a brand. Artists and entertainers use the strength of their trade name to build on success. In *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, Lawrence Lessig reveals the lesson Time Warner learned about sharing intellectual property, "that being less restrictive with its intellectual property strengthened fans' loyalty to the brand" (Lessig, 2008, Kindle location, 4202). When a trademark becomes famous, it creates an instant connection with a brand or individual. Today, with more and more Internet sales, trademarks are global. This opens up new challenges for controlling the use of similar marks.

There are two ways to obtain ownership of a trademark. The first is by using the mark in commerce in connection with goods and services. These 'common law' rights are limited by geographic location where the product or service is used. The owner of the mark is the first person to use it. There must be a period of time using the mark in commerce for it to derive 'secondary meaning' for trademark protection to kick in (cyber.law.harvard.edu/tm, n.d.). A secondary meaning comes from the public's association between the word and the source. Courts use different methods for determining secondary meaning. Considerations include: association, degree and manner of advertising, the length and manner of use, and exclusivity. (Trager, et al., 2013). A second way of acquiring trademark rights is by registering the mark with the U.S. Patent and Trademark Office. Registering is not necessary for protection and can be expensive, but it does afford certain additional rights (dmlp.org, n.d.). These rights include: using the trademark nationwide, notifying others that the trademark is in use, and the right to sue for damages from trademark infringement (cyber.law.harvard.edu/tm, n.d.). A valid trademark can prevent others from using a similar mark in commerce. Depending on how famous the mark, it may also prevent others from using the mark for dissimilar goods or services (dmlp.org, n.d.). Since some trademarks are registered and some not, it can be difficult to know when a mark has been used.

The Lanham Act is “a federal law that regulates the trademark registration process but that also contains a section permitting business competitors to sue one another for false advertising” (Trager, et al., 2013, p. 729). The Lanham Act also protects names that are not registered. The law was enacted to protect consumers from confusion about what company is supplying the goods. Copyright and trademark laws attempt to balance freedom of expression, while protecting the expression for the creators. The law allows for fair use, however fair use is difficult to define (Trager, et al., 2013). Fair use refers to when a mark is used in good faith, such as education or research. Fair use can also protect commentary or parody when it is not used in commerce (cyber.law.harvard.edu/tm, n.d.). The opportunity for fair use is necessary, as stated in the U.S. Constitution to “promote the progress of science and useful arts” (copyright.gov, n.d.).

Trademark infringement can occur if a name causes confusion or is used for deceitful purposes regarding the association of a product name to a company (Trager, et al., 2013). Similar marks may not cause confusion if there is considerable difference between the products or services. Courts use different standards to determine ‘likelihood of confusion,’ including: strength of the mark, similarity of goods or services, similarity of the trademarks, marketing channels, defendants's intent, likelihood of expansion, and evidence of confusion (dmlp.org, n.d.). It can be difficult to determine if the use of a trademark will infringe upon a trademark owner's rights. Some states also have antidilution statutes. “Using a famous trademark in a way that disparages the mark or diminishes its effectiveness is known as ‘dilution’” (Trager, et al., 2013, p. 624). Antidilution statutes vary from state to state, some states allowing a fair use exception. This allows for the use of a famous mark for parody, commentary, news reporting, and comparative advertising (Trager, et al., 2013). To make a case for dilution, the trademark owner does not have to prove likelihood of confusion, the goods or services do not have to be similar, but the trademark does have to be well recognized (dmlp.org, n.d.).

Precedent Cases

The court determines the rulings in trademark cases on an ad hoc basis. The following cases are offered to show conflict in copyright claims and a need for improvement. In 1997, Dillard's Department Store ran a series of advertisements promoting henley t-shirts, a collarless pullover shirt consisting of a placket of 2 to 5 buttons at the neckline. The advertisements used a ‘play on words’ between this style of shirt referring to Don Henley, a famous musician in the popular musical group *The Eagles*. One advertisement stated, ‘Don a henley, Take it easy.’ The plaintiff (Henley) alleged the advertisements infringed upon his right of publicity, suing for a) appropriation, b) trademark dilution, and c) unfair competition. The defendants (Dillard's) suggested that the use of the words ‘Don a henley’ added no value to the advertisement, that printing the phrase was ‘just fun.’ (rightofpublicity.com, 1999). A partial summary judgment was granted to the plaintiff in *Henley v. Dillard Department Stores*. A summary judgment offers a “quick resolution of a legal dispute in which a judge summarily decides certain points and issues a judgment dismissing the case” (Trager, et al., 2013, p.33). Judge Solis ruled, “a defendant may be held liable for using a phrase or image that clearly identifies the celebrity, in addition to finding liability for using a plaintiff's precise name” (rightofpublicity.com, 1999). It was clear to the court that Dillard's had appropriated Henley's name and identity with the intent to attract customers without permission.

In 1982, Elby's Family Restaurants in PA, WV, and OH were sued over the rights to use the ‘Big Boy’ trademark in *Frisch's Restaurants, Inc v. Elby's Big Boy of Steubenville, Inc*. The trademark rights to ‘Big Boy’ belonged to Frisch's Restaurants, Inc. of Ohio (plaintiffs). The plaintiffs alleged that the defendants' use of the ‘Big Boy’ trademark was deceptive and created confusion. The trademark infringement claim was for: a) false advertising, b) false representation, and c) unfair competition. The court used the Lanham Act to determine the decision and ruled in favor of the plaintiffs. They determined, “eight factors that are relevant to the likelihood of confusion: 1) strength of the plaintiffs' mark, 2) relatedness of the goods, 3) similarity of the marks, 4) evidence of actual confusion, 5) marketing channels used, 6) likely degree of purchaser care, 7) defendants' intent in selecting the mark, 8) likelihood of expansion of the product lines” (openjurist.org, 1982). The defendants misrepresented an affiliation with the ‘Big Boy’ trademark, creating a ‘likelihood of confusion’ and the plaintiffs were awarded damages.

In the 1983 decision of *Carson v. Here's Johnny Portable Toilets, Inc.*, the court ruled that Earl Braxton (defendant) could not use ‘Here's Johnny’ for the name of his portable toilets. Johnny Carson (plaintiff) was a famous late night talk show host. His announcer, Ed McMahon used the introduction ‘Here's Johnny’ at the start of each show. Carson claimed the famous phrase identified him and that Braxton was using Carson's celebrity status for commercial gain (openjurist.org, 1983). The plaintiff sued for unfair competition and invasion of the right of publicity. The court decided that the right of publicity does not apply to phrases, but

only to names. However, because the defendant testified that he chose the phrase intentionally to take advantage of Carson's fame, the court stated, "We therefore conclude that, applying the correct legal standards, appellants are entitled to judgment. The proof showed without question that appellee had appropriated Carson's identity in connection with its corporate name and its product" (openjurist.org, 1983). When Carson died in 2005, Braxton tried again, the court decided he still can not use the 'Here's Johnny' trademark (Gardner, 2010). The case of *Carson v. Here's Johnny Portable Toilets, Inc.* shows that a celebrity's identity can be appropriated in different ways.

In 1995, when Hormel Foods Corporation learned of Jim Henson Productions' plan to include a character named 'Spa'am' in the movie Muppet Treasure Island (1996), the plaintiffs (Hormel Foods Corporation) alleged infringement on their trademark name for the luncheon meat product known as 'SPAM.' The plaintiffs had been using the trademark since 1939. The defendants intentionally used the name to poke fun at the product SPAM by naming their character of a boar: Spa'am. The plaintiffs' claim was the association of a 'grotesque' boar would "call into question the purity and high quality of its meat product" (cyber.law.harvard.edu/hormel, n.d.). The 1995 court decision of *Hormel Foods Corp. v. Jim Henson Productions, Inc.* stated that the Muppets are, "well known for parodies of brand names, trademarks, television programs, fictional characters, and celebrities" (cyber.law.harvard.edu/hormel, n.d.). The court decided there was not a likelihood of confusion between the SPAM product and the swine character, so it was not an infringement. Both marks were equally distinctive, easily recognized, and the Muppets' propensity for parody and satire establishes their intent. Furthermore, the marks were dissimilar and the products and merchandise were not in direct competition in the marketplace.

In a 1977 case, *Gucci Shops, Inc. v. R.H. Macy & Co.*, the plaintiffs (Gucci Shops, Inc.) alleged trademark infringement and unfair competition against the defendants (Fashioncraft Products, Inc.) for manufacturing diaper bags designed to look like Gucci handbags. The diaper bags were sold at retail department stores including Macy's and Gimbels. The defendants argued that the bags were meant as a parody to 'poke fun at' the plaintiffs. The test used by the court was "whether use of the imitating mark 'is likely to cause confusion, or to cause mistake, or to deceive'" (cyber.law.harvard.edu/gucci, n.d.). The bags were similar in trade dress, with stripes on the diaper bag mimicking the colors and style of a Gucci handbag. A similar typeface was used, however the spelling of GUCCI was changed to GUCCHI and the letters GOO were added to the mark. The test of infringement used by the court was whether the mark was "likely to cause confusion, or to cause mistake, or to deceive" (cyber.law.harvard.edu/gucci, n.d.). District Judge Motley ruled that confusion was indeed possible and 'Gucchi GOO' was not protected by the parody defense (cyber.law.harvard.edu/gucci, n.d.).

In *AMF Inc. v. Sleekcraft Boats*, the 1979 decision of Judge Anderson found the use of similar trademarks between these two companies was unlikely to cause confusion. Both parties manufacture and advertise recreational boats using similar marks: 'Slickcraft' and 'Sleekcraft.' The plaintiffs (AMF, Inc.) registered the trademark Slickcraft in 1969. Nescher Boats (defendants) began using the trade name Sleekcraft in 1968. Infringement is usually found when products are similar and in direct competition. The court found the two lines of boats "appeal to separate sub-markets" (cyber.law.harvard.edu/amf, n.d.). The plaintiffs' product is geared toward family recreation while the defendants' boats appeal to high speed recreation. While the plaintiffs demonstrated there was confusion in the marketplace and closeness in meaning between the two marks, the court found that, "the two marks are easily distinguishable in use either when written or spoken" (cyber.law.harvard.edu/amf, n.d.).

Potential Ruling Analysis

It has been said that imitation is the sincerest form of flattery, but when it comes to someone profiting off the work of another, not so much. 'Hall & Oates' is one of the most successful popular music groups of all time. They have invested a lot of time and energy in creating and maintaining their public persona. In the case of *Whole Oats Enterprises v. Early Bird Foods & Co., LLC*, the plaintiffs claim the defendants intend to capitalize on the fame and notoriety of Daryl Hall and John Oates. Whole Oats Enterprises owns the trademark 'Daryl Hall & John Oates.' Over the years, they have been commonly referred to as 'Hall & Oates.' An agreement already exists between the plaintiffs and the Nashville, Tennessee-based company for the use of the brand 'Haulin' Oats.' The connection between 'Hall & Oates' and 'Haulin' Oates' has been established. It is likely to cause confusion, as in the case of *Frisch's Restaurants, Inc v. Elby's Big Boy of Steubenville, Inc.* The court should rule in favor of the plaintiffs based on three of the eight factors established in this case: 1) strength of the plaintiffs's mark, 2) relatedness of the goods, 3) similarity of the marks (openjurist.org, 1982).

Because of the royalty agreement between Whole Oats Enterprises and the Nashville, Tennessee-based company, there is likely to be confusion, which could infringe or dilute the sale of like-named products. The court should also consider which company began selling the product first. In addition, do Daryl Hall and John Oates own the rights to control all variations of their name *and* deviations that rhyme with it? In *Hormel Foods Corp. v. Jim Henson Productions, Inc.*, the court's decision did not give Hormel exclusive rights to such alterations.

Some other important questions should be considered in order to establish ground rules for future infringement cases. Do Daryl Hall and John Oates actually manufacture and sell oats? Would the public believe that the use of a pun or parody for a product or company name create a connection among consumers? Are consumers likely to buy a granola product because of Daryl Hall & John Oates support? The standard for determining trademark infringement is 'likelihood of confusion.' Using the pun 'Haulin' Oats' to name a product that has no connection to rock and roll music would not necessarily identify the plaintiffs to the brand. The products are dissimilar and there is no other connection. Still, the court ruled in *Henley v. Dillard Department Stores* that using a variation or 'play on words' was an appropriation. This ruling was based on the lack of evidence to suggest that the advertisement did not identify Don Henley (rightofpublicity.com, 1999). Since a connection was established, it could influence his fans with an inducement to buy the product.

Early Bird Foods & Co., LLC offers several varieties of granola products, each designated by an equally humorous name. Other flavors include: 'Farmhand's Choice,' 'Choc-a-Doodle-Do,' and 'Early Bird Gets the Worm.' Would the average, reasonable person then believe that a farmhand actually chose their granola? Or that a rooster is cackling his commendation for chocolatey snacks? Surely, the latter offering does not actually contain worms. In *Hormel Foods Corp. v. Jim Henson Productions, Inc.*, the court decided the Muppets' humor established their intent. Early Bird Foods & Co. also use humor in their marketing strategy. But, the crux of this case lies in the royalty agreement between Whole Oats Enterprises and 'Haulin' Oats' from Nashville, Tennessee. Since they have an agreement, there is likelihood of confusion. Clearly, Daryl Hall and John Oates have a financial agreement that could be in jeopardy. However, the bigger picture is the message that the court's decision sends to future cases involving a 'play on words' or a variation of a trademark or celebrities' name used as a product's brand name. There needs to be a bright-line distinction on 'Pun Rights' with consistent rules established, setting guidelines and boundaries for media practitioners.

Discussion & Conclusion

The likelihood of confusion occurs in the court's own decisions presented herein. Likelihood of confusion is shown to be an erroneous standard in *AMF Inc. v. Sleekcraft Boats*, with both parties citing precedents to support their case. The court decisions presented as precedent in *AMF Inc. v. Sleekcraft Boats* show inconsistency from case to case, switching between different tests for infringement (cyber.law.harvard.edu/amf/, n.d.). In *AMF Inc. v. Sleekcraft Boats*, each party shows evidence of actual confusion as two almost identical products are going by two very similar trade names in comparable markets. However, the court found confusion to be unlikely.

Inconsistencies abound in the smorgasbord of decisions presented in this paper. The porcine character named Spa'am was not found to violate the trademark rights of Hormel's mystery meat in *Hormel Foods Corp. v. Jim Henson Productions, Inc.* On the contrary, Gucchie Goo diaper bags were unprotected from a parody defense in *Gucci Shops, Inc. v. R.H. Macy & Co.* This dichotomy displays the difficulty for companies to know when the line has been crossed. Additionally, two totally different products in the cases *Henley v. Dillard Department Stores* and *Carson v. Here's Johnny Portable Toilets, Inc.* were found to be unfair competition for indirectly referring to famous celebrities. Each case is analogous for unauthorized commercial use of a trademark. They also share common 'tongue-in-cheek' humor which is plentiful in our culture where almost nothing is taken seriously.

Today's culture is riddled with jokes, parody, satire, puns, and appropriations. Television and entertainment is rich with shows like Monty Python, Saturday Night Live, The Simpsons, and The Muppets that poke fun at society. We get our news from satirical shows like The Daily Show and Last Week Tonight. One cannot read the news without perusing a plethora of puns. While celebrities might not like it, they have willingly placed themselves in the public eye, becoming subjects of imitation, spoofs, and lampoons. The ability to laugh at ourselves and society reminds us that it is not always necessary to take things too seriously. Since logos and trademarks are a part of our culture, we need to be able to laugh at them, too. To deny this,

would be censorship. However, parody that causes consumer confusion or unfair competition can impact everyone.

Intellectual property laws were enacted to protect the First Amendment by encouraging artistic expression while protecting artists and inventors from others using their ideas and innovations. So, essentially, they become speech-promoting, speech restrictions. A balance is in order that puts the interests of the public first. Trademark rights are limited, applying only to goods and services identified by a trademark. They are important to prohibit others from selling similar goods and services, or creating consumer confusion. Trademarks cannot be used to unconditionally stifle the use of a word, phrase, or image from common use (dmlp.org, n.d.). Rules that restrict the use of trademarks may also restrict the communication of ideas.

The Internet has brought about new challenges for communication professionals. We have become a global society. Trademarks that were once able to coexist in different geographic locations are experiencing increasing competition. Consumers have become content creators, trademark infringement will only become more difficult to control in the near future. The 'likelihood of confusion' will become 'unconditional confusion' if the laws are not revised to keep up with the changing media landscape.

Whole Oats Enterprises v. Early Bird Foods & Co., LLC is important for media professionals in order to balance the right of publicity and trademark infringement with First Amendment rights, while maintaining ethical standards. Conflicts are inevitable in a democratic culture. Businesses, media professionals, graphic designers, marketing and advertising companies need transparent rules to understand the boundaries. The right of publicity, the Lanham Act, and trademark laws protect a celebrity's economic and expressive interests. Sometimes, the laws may not apply; each case needs to be considered on an individual basis. The First Amendment allows for freedom of expression and the right to create original work, including parody and satire. In the decision of *Whole Oats Enterprises v. Early Bird Foods & Co., LLC.*, Daryl Hall and John Oates could come across as using their celebrity status as a spear for censorship. The intellectual property laws and right of publicity laws need to be standardized and reigned in to protect First Amendment rights without confusion. This paper calls for updated, strict guidelines and fair tests, so it is no longer a guessing game when a company might be sued for trademark infringement or appropriation. As it stands, Americans have the right to freedom of speech, until someone says they don't.

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