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Consumer Commentary Website Does Not Constitute Trademark Infringement

By Peter C. Lemire of
Leyendecker & Lemire, LLC
A Colorado Intellectual Property & Business Law Firm

9th Circuit Supports Non Commercial Use of Trademark in Domain Name – good news for “consumer commentary” websites

In a decision issued on April 4, 2005, the 9th Circuit Court of Appeals upheld a lower decision that the noncommercial use of a trademark in a domain name of a website which contained consumer commentary about the products and services represented by the trademark is not considered infringement under the Lanham Act (the federal trademark statute). In *Bosley Medical Institute, Inc v. Kremer*, the website in question (www.BosleyMedical.com) did not earn any revenue, sell any goods or services on the website or have any links to any of Bosley’s competitors. The court relied on the US Supreme Court’s decision in *Prestonettes, Inc. v. Coty*, 264 U.S. 359 (1924) which states that “trademark infringement law prevents only unauthorized uses of a trademark in connection with a commercial transaction in which the trademark is being used to confuse potential consumers.” Since there wasn’t any commercial activity taking place on the website or on other websites that were linked to the website in question, the use of the mark in the domain name did not constitute trademark infringement. However, Bosley could still have a claim under the Anticybersquatting Consumer Protection Act – if they can show that Kramer had a “bad faith intent to profit” from the use of the trademark. So we will have to keep track of this one and see how it goes at the trial court level. For right now it seems to be a victory for proponents of free speech and consumer commentary websites.

About the Author -

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Mr. Lemire is a Founding Member of the law firm of Leyendecker Lemire LLC, specializing in business and intellectual property law. Previously, Mr. Lemire served as in house counsel to various companies in the Denver Metro area in industries ranging from high tech ".com's" to strategic investment firms specializing in the purchase and sale of distressed commercial debt. Mr. Lemire has advised companies on issues such as general corporate and business law, employment law, mergers and acquisitions, contract drafting and negotiation, software licensing, strategic relationships, copyright, trademark and cyberlaw. He is a Member of the Colorado Bar Association, the American Bar Association's (ABA) Business Law section, the ABA Cyberspace Law and Internet Law Committees as well as the ABA's subcommittee on Electronic Commerce, as well as the Secretary of State's Legislative Drafting Committee on Trademarks.

Peter Lemire can be contacted at (303) 768-0123 peter@lld-law.com

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