

Penn State Victory Maintains Uneasy Status Quo in Sports Merchandising Industry

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Most major universities have developed extremely lucrative business empires by exploiting the use of their trademarks and trade dress on apparel and merchandise, among other things. They have done so on the theory that the public inherently associates those names and logos with the universities, and therefore assumes that any merchandise or apparel bearing those marks must be licensed by the university. For the most part, the courts have supported this theory, and hence a robust licensing industry involving those properties has flourished.

That theory and the underlying business model came under direct attack in the case of *Penn State v. Vintage Brand*. Vintage Brand is attempting to build its own business empire on the backs of the same university trademarks and trade dress, but without obtaining a license or consent from the universities. As a result, Vintage Brand has been sued by Penn State and faces similar lawsuits from other universities, including Purdue, UCLA and Baylor. The Penn State case was the first to go to trial.

A little background on trademark law: A trademark is a word, name, symbol or device that is used to identify and distinguish the source of goods and services. The primary purpose of trademark law is consumer protection, namely preventing consumer confusion as to the source of a particular product or service. It allows consumers to rely on their expectations as to the quality of a product based on the reputation of the provider. At the federal level, the Lanham Act is the primary source of trademark law. In general, a trademark holder may prevent a third party from using its trademarks in a way that is likely to cause consumer confusion as to whether a particular product is produced or licensed by the trademark owner or the third party. That is the crux of trademark law.

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Penn State has licensed its trademarks since 1983. The university claimed that Vintage Brand's products misled consumers into thinking that Penn State was either the source of the products or that the products were officially licensed by Penn State. The university's claims have the support of many courts that have used a "per se" analysis to evaluate these types of cases. In essence, the "per se" analysis assumes that consumers inherently associate university names and symbols with the institution itself. The trial court's rejection of the "per se" rule (opting instead for a fact-intensive inquiry) sent a mini shockwave through the sports merchandising industry, resulting in acute industry scrutiny of this case.

The theory espoused by Vintage Brand (which has some support in older cases), is that its use of the designs is merely ornamental, not "trademark" usage. The "decorations" (i.e. university logos and trade dress), simply allow consumers to show their allegiance and support for their favored school or team, and to that extent the use of the designs is not "source identifying" trademark use, and does not result in any consumer confusion as to the source of the goods. Consumers are merely showing their support for the university, and not assuming that the university has produced or approved the item of apparel, for example. Vintage Brand further noted that it provides disclaimers on its website and products that indicate the merchandise is not officially licensed by Penn State.

On November 19, 2024, the jury, which came from communities near Penn State, sided with the university in finding that Vintage Brand willfully infringed Penn State's trademarks by selling merchandise with Penn State logos, and awarded the university \$28,000.

One interesting issue Judge Brann discussed in his pretrial order denying Penn State's motion for summary judgment is that most of the public mistakenly believes that trademark law requires a license in order to use a famous brand. As a result, when consumers see a university logo on merchandise, they think the university either produced or licensed the item, albeit perhaps based on this mistaken belief. For better or worse, this gave Penn State a key advantage. The university used survey evidence about Vintage Brand's products to bolster this argument. That put Vintage Brand in the unenviable position to argue that without the misunderstanding of the law, consumers would not presume a licensing relationship. Vintage Brand lost that battle.

Judge Brann's rejection of the "per se" rule favored by some other courts (but not expressly adopted in the Third Circuit, where this case could be appealed to), would seem to make this case a prime candidate for appeal.

In the meantime, major universities will no doubt continue the lucrative practice of exploiting their trademarks and trade dress on apparel and merchandise, but no doubt with a keen eye on developments in this area of the law due to the potential chink in the "per se" rule armor that has emerged from this case.

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