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Re: Final Artifact

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Trademark Turf Ware- The Battle between High School and College Institutes

Think back to your childhood and all the aspects of growing up in whatever town or place you are from. This place that you call “home” is both special and unique, with memories you will hold dear for the rest of your life. Growing up in a small town just south of Atlanta, one of my favorite aspects of my teenage years was what many call “Friday Night Lights.” For those of you unfamiliar with this term, it refers to Friday night high school football. It’s a time when people get together to cheer on their local high school as it battles teams from across the region and state during the cool, fall nights that we all associate with the game of football. And with this, each team and fan base is symbolized by a mark which embodies the standards and aspects of the high school of which it is representing. My high school in particular was signified by a slightly tilted maroon “W,” with a black shadow to the left of the letter. If I see this image, the many recollections of my high school years quickly zip through my head, and a feeling of “home” surrounds me. But what if someone else were to come across this mark? What would be their initial reaction? The answer is most likely the University of Wisconsin, a university located in Madison, Wisconsin, thousands of miles away from the suburbs of the metro Atlanta area. While many of you may not think much of it, as I never did growing up, there is an issue with this conflict. With high school media coverage, sports in particular, growing at a rapid pace, many of these universities are beginning to take notice of schools like mine who are utilizing very similar, if not identical, representative marks of trademark holding universities. Although my school has yet to be targeted, many universities across the nation are feeling the heat and starting to defend their trademark rights through extensive monitoring.

To help you better understand the situation, let us first establish what in fact a trademark logo or mark is. A trademark symbol is defined as being “a distinctive sign or indicator used by an individual, business organization, or other legal entity to promote or brand goods of which originate from a unique source.” In simpler terms, each university has their own sense of uniqueness about themselves, whether it is for outstanding academics, athletic programs, etc. With this uniqueness comes a mark that people associate with each of these institutes. With Georgia Tech you have the yellow jacket, the University of Florida the gator, and so on. With nationally popular trademarks like this, we come to establish a relationship between the name and the mark. This is important because the whole idea behind trademark policy is to protect this public association that is widely accepted and known. As noted earlier, the growth of some of these high schools in areas across the United States has threatened this sense of security among universities. Because of this, we have seen numerous cease and desist letters being sent to thousands of high schools across the nation. When confronted with these documents, most high schools choose not to fight the issue – as they don’t have the money or resources to contest the claims. "The problem when you’re a defendant is you can spend the money to fight it, and if you lose, you also have to spend the money to change everything," said Dineen Wasylik, a trademark lawyer based in Tampa, Fla. This has created what many feel have been cut-and-dry cases in the past, with most high schools complying with the demands to cease use of their logo that is in current use. One local Florida school who was considered a violator of the University of Florida’s gator logo quoted a $60,000 eventual cost to account for the changes that would be required, thus we see many of these schools choose to cut their losses and to not take the matter to legal court. But what if a high school chose to fight back? Through a breakdown of the legal components of trademark law, of which I will do in the following sections, I believe you will find that many of the universities are not as powerful as you might think, and high schools truly do have a case to protect their use of these images.

First, it is important to establish why in fact trademark protection law is set into place. For the trademark holder, protection against two important aspects is critical: confusion and dilution. Both of these elements are vital in maintaining adequate representation for the original holder. When we mention the term “confusion,” we are referring to the idea that a vast majority of so-called “random individuals” cannot distinguish a particular mark in connection with the original holder. This is significant because a universities’ value comes from its ability to be unique and distinguishable among the general public. Dilution kind of follows the same idea, as it is a concept which provides the owner of a famous trademark the ability to limit use of their mark by others in fear that it could potentially lessen its uniqueness. This leads to the main question behind the issue: Do high schools pose a significant threat to both the confusion and dilution of a university’s trademarked logo or image?

To address the first component, confusion, let’s take a look at a famous legal case involving Polaroid Corp. v. Polaroid Elects. In this dispute, the court came to establish the “Polaroid factors,” which outlined the dynamics involved with determining whether or not a “likelihood for confusion” was possible. These were listed as follows: The strength of the plaintiff’s mark; the degree of similarity between the plaintiff’s and the defendant’s marks; the proximity of the products or services covered by the marks; the likelihood that the plaintiff will bridge the gap; evidence of actual confusion of consumers; the defendant’s good faith in adopting the mark; the quality of the defendant’s product or service; and finally consumer sophistication. I’ll hit on a few of these concepts in which high schools could potentially make a legal case. Beginning with factor one, many of these universities would have trouble arguing that in fact their mark is strong. The overall strength of a mark is often determined by how unique that mark truly is. Schools like Clemson University, whose representative mark is that of a tiger paw, would have trouble proving in fact their logo is unique. This type of paw print is a widely used image, and thus would most likely lessen its strength. Next, we will look at the degree of similarity between marks. It is important to note that the “courts have held that similarity is based not only on appearance but also on the total effect and overall impression that the mark would have on an ordinary, prudent person.” Many of the logos utilized by high schools, while still similar to the trademarked college image, utilize different color schemes or slightly different alterations to the image. Given this information, universities would have to prove not only similarity in the images, but also that the overall impression by a typical person is similar enough to create confusion as to where the source came from. For example, a green “G” would not become confused with the trademarked red, black, and white “G” of the University of Georgia. Third, the overall geographical region covered by these two entities differs greatly. Most high schools are only well-known within their small, isolated region, unlike that of major college universities, who are often nationally recognized. Also, the two levels of education never compete against each other, thus there is a strong argument that both high schools and universities are not even in the same market place. Fourth, universities would have to prove evidence that in fact high schools are capable of “bridging the gap” and competing from a financial and competitive standpoint with their university. While high schools have grown over the past decade, they are still nowhere near the level, financially and from a media standpoint, to that of major universities. And finally, these universities would need to have hard evidence of actual confusion within the market place between the two images, while also proving that the instances are more than just isolated. This would be a tough test for any university, and would most likely be the strongest element within a high school’s legal argument. Based upon these key elements, a university could potentially struggle to defend the idea that there is an imminent threat of confusion between themselves and whichever high school they are seeking to target.

Addressing the issue of dilution, we can take it one step further and focus specifically on the concept of blurring dilution. Blurring dilution is defined as an “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark.” In our case, the famous mark being that of the university. When concentrating on this concept, “the court may consider all relevant factors, of which include the following: the degree of similarity between the mark or trade name and the famous mark; the degree of inherent or acquired distinctiveness of the famous mark; the extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark; the degree of recognition of the famous mark; whether the user of the mark or trade name intended to create an association with the famous mark; and finally any actual association between the mark or trade name and the famous mark.” Although many of these mirror the components for determining a “likelihood for confusion,” it is important to point out a few of these areas we may not have discussed in the previous section. Based on these factors, a university would have to prove that the high school was seeking to form an association with their establishment. For high schools particularly not in the same geographical region, it would be hard to compile concrete evidence to make this argument. Also, the degree of recognition held for the famous mark would most likely outweigh a high schools isolated use of the image. Referring back to my high school, the overall degree of recognition for the “W” image would be extremely strong in favor of the University of Wisconsin in nearly all areas except my small, remote region. And finally, there are many logos and images utilized by universities that may not be considered to be “substantially exclusive use.” A bulldog for example is a widely utilized mascot among numerous institutions, meaning that an argument in favor of exclusive use would be difficult to develop. Once again, we see the struggles a university may encounter if it did in fact have to face off against a high school in legal court.

So you next question you ask may be, “What steps could be taken to improve the overall situation between the two parties?” Well, one university has taken a progressive step in the right direction. Kansas State University has a program set up in which high schools are able to borrow the KSU “powercat” logo under the stipulation that they pay one dollar every two years, and it also requires them to go through a vendor to sell T-shirts and apparel bearing the “powercat” image. This is an example of a solid step in the right direction. The only way we will ever see potential progress in this legal issue is that both universities and high schools are willing to come together on the matter and reason with each other. Instead of just hitting high schools with a cease and desist letter, maybe universities can find a better way of handling the situation, one in which they will not damage their representation as a bully. And the same goes for high schools, which should understand and respect the rights that universities have in their trademark protection.

With the growth of high school media coverage across the nation, this is an issue that will only become more prevalent in the coming years. It is important that action is taken now instead of later, and it is also vital that high schools become aware of their position and rights when it comes to trademark law. Many of the high schools around the nation, including my very own, are at risk and could potentially be blindsided with a nasty legal matter between themselves and a large university. Universities should also be aware that their case made against high schools may not be as cut-and-dry as they had originally thought. I truly believe if both high schools and universities are able to come together on the issue, however, they will each reap the benefits of avoiding unnecessary legal disputes.

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