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Multi Time Machine, Inc. v. Amazon.com, Inc.

804 F.3d 930 (9th Cir. 2015)

RYAN M. HERRERA*

BACKGROUND

Multi Time Machine, Inc. (“MTM”), a manufacturer of military style watches, brought a claim against Amazon.com (“Amazon”) alleging that the search term “MTM Special Ops” on Amazon’s website resulted in a likelihood of consumer confusion, therefore causing trademark infringement in violation of the Lanham Act.¹

In an effort to preserve their reputation as an exclusive watch brand, MTM does not sell watches through Amazon, but instead sells watches directly to consumers. Because MTM also prohibits its retailers from selling through Amazon, MTM watches are unavailable on Amazon’s website. MTM has a federally registered trademark for “MTM Special Ops.”

Amazon, an online retailer, sells millions of Amazon and third party products on its website. Consumers can search for products on the Amazon website using the search function which allows them to find relevant results based on key words. Additionally, Amazon utilizes consumer behavior analysis techniques to generate relevant results. Therefore, a customer on Amazon who searches for “mtm special ops” would receive a list of relevant results in three ways. First, the search terms “mtm special ops” would be displayed in the search box. Second, the terms could be found in a “breadcrumb” (a breadcrumb allows consumers to track the source of the original search). Third, an option for related searches, of other watch brands competing with MTM, with the suggestion “mtm special ops watch” and words indicating that there are a number of other related results.

PROCEDURAL HISTORY

MTM alleged that the search results on Amazon’s website violated the Lanham Act² and infringed the MTM mark because the search results created a likelihood of consumer confusion. Amazon then filed for summary judgment claiming it (1) did not use the MTM mark and (2) consumers would not likely be confused that the product listings included

* Mr. Herrera is a 2017 Juris Doctor candidate at the University of San Francisco School of Law.

1 Multi Time Machine, Inc. v. Amazon Inc. 804 F.3d 930, 932 (9th Cir. 2015).

2 *Id.* at 934 (discussing 15 U.S.C.A. § 1125 (2012)).

the MTM watches. The district court only addressed whether there would be a likelihood of consumer confusion.

The district court found no likelihood of confusion from Amazon's use of MTM's trademarks and granted summary judgment in favor of Amazon. In conducting its analysis, the district court found in favor of Amazon by focusing on the type of consumer and the clarity of the Amazon webpage's search results. MTM then appealed to the United States Court of Appeals for the Ninth Circuit.

ISSUE

The United States Court of Appeals for the Ninth Circuit addressed the issue of whether the district court erred in granting summary judgment in favor of Amazon in determining that there was no likelihood of consumer confusion and therefore no trademark infringement under the Lanham Act.

DECISION

The Ninth Circuit affirmed the district court's decision and determined that it did not err in granting summary judgment in favor of Amazon because the reasonably prudent consumer would not likely be confused by Amazon's search results.

REASONING

In its analysis, the Ninth Circuit first identified the consumer in this case. The court determined that the consumer was a reasonably prudent consumer. Next, the court questioned whether that specific consumer was likely to be confused as to the origin of the related goods. Consumer confusion must be probable for a party to prevail on a likelihood of confusion claim. The court reasoned that Amazon simply listed the brands that were in stock in reaction to a consumer search for a brand it did not carry, MTM.

The court acknowledged the 8-factor test found in *AMF Inc. v. Sleekcraft Boat*³ ("Sleekcraft factors") as the test to analyze likelihood of confusion. The court determined that some factors are more important than others and the importance of the factors should be addressed on a case-by-case basis. In addition to the Sleekcraft factors, the court explained that while evaluating trademark infringement cases involving search engines, it is important to consider the "labeling and appearance of the advertisements and the surrounding context on the screen displaying the results page."⁴ However, the court explained that the Sleekcraft factors were ill-suited in analyzing the likelihood of confusion with an Amazon search because they

3 *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979).

4 *Multi Time Machine, Inc.*, 804, F.3d at 936 (quoting *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.* 638 F.3d 1137, 1154 (9th Cir. 2011)).

were created to determine the likelihood of confusion of two brands competing in the same market.

MTM then argued that Amazon's search results page amounted to initial interest confusion. Initial interest confusion occurs when a consumer expects a certain brand but instead becomes temporarily confused by a competing brand with similar goods. Therefore, a company may unfairly capitalize on the goodwill of a competing mark. MTM argued that consumers could be confused when a search for MTM watches, which are not sold on Amazon, still leads to a webpage of search results full of watches and brands that compete with MTM, absent a disclaimer stating that Amazon does not in fact sell the MTM watch.

Instead of using the Sleekcraft factors and examining the marks, the court looked at the design of the Amazon webpage to determine if the reasonably prudent consumer would likely be confused as to where the goods originate. The court based the confusion inquiry on two questions: (1) "[w]ho is the relevant reasonable consumer?; and (2) [w]hat would he reasonably believe based on what he saw on the screen?"⁵

For the first question, the court acknowledged that confusion is less likely when the consumer exercises heightened care. However the court felt that as the internet becomes more familiar to consumers, consumers become more and therefore the relevant consumer is a reasonable online shopper. In addition the court determined that a reasonable online consumer would exercise more care in making the purchase, since MTM's watches are a higher expense item.

For the second question, the court looked at the labeling and appearance of Amazon's web page and agreed with MTM's suggestion that clear labeling of products is important. The court then used MTM's suggestion to support its own argument that Amazon clearly labeled the products to avoid confusion among the relevant consumers familiar with making purchases online. The court pointed toward the labeling of non-MTM products after a consumer searched for "mtm special ops" and decided that because the brand names, model numbers, manufacturer name and photographs of the products were clearly visible in the Amazon search result list, the consumer would not likely be confused. Additionally, the fact that the search listed non-watch products weighed against a finding that the consumer would be confused as to the source of the goods..

MTM unsuccessfully argued that Amazon must explain to customers on its search results page that it does not offer MTM watches for sale before listing alternative watches. The court found this unnecessary because a prudent consumer accustomed to online shopping can clearly read and understand the results. In conclusion, there were not enough factual disputes to warrant a jury trial to make an ultimate decision on whether there was a likelihood of confusion. The court determined that any possible factual disputes, related to the Amazon search results page, were

5 *Id.* at 937.

not material to the analysis. Although the court acknowledged that the likelihood of confusion analysis is usually a question of fact for a jury, it held that in cases where the confusion is highly unlikely, a decision on summary judgment is proper. The court also reasoned that other factors of the likelihood of confusion analysis were either neutral or unimportant to the case as to reaching a conclusion on summary judgment. Analyzing the type of goods and the cautious nature of the consumer as well as the labeling of the products within the context of Amazon's display was enough to sway the court to uphold the summary judgment decision.

The court found that Amazon did not have an intent to confuse the consumer, there was no evidence of actual confusion, and MTM's alleged strength of the mark was unimportant to the ultimate decision. Finally, Judge Silverman's majority opinion posits that traditional likelihood of confusion factors are often irrelevant to a case with an internet search of clearly labeled products. The Ninth Circuit Court of Appeals affirmed the district court's decision in granting summary judgment for Amazon.

Judge Bea's dissent criticized the majority's decision to place the judge in the role of a juror, departing from precedent in trademark law. The dissent emphasized a consumer's search result referencing "mtm special ops" three times without expressly indicating that Amazon did not carry the watch and distinguished the lack of a disclaimer to other websites that attempt to alleviate potential confusion. Although Amazon correctly has the brand name next to the different product listings, Bea argued that the consumer may initially think that MTM has a relationship with the other watch companies or uses its parts in other watches. Judge Bea argued that the majority opinion mostly avoided the issue of initial interest confusion and instead focused on the consumer's decision making process in its entirety, specifically on finalizing the purchase. Bea argued that the initial interest confusion analysis must be given more and that it should be a question for the jury. The dissent stated that because there are clear factual issues as to whether or not a consumer may have initial confusion in thinking that a non-MTM watch could potentially be affiliated with MTM in some manner, the district court should have denied Amazon's motion for summary judgment. Bea also argued that because the majority focuses so narrowly on the argument that clear labeling is the most important factor that would lead to a consumer not being confused, it failed to acknowledge other important factors of the likelihood of confusion test. When taking all evidence into consideration with all factors of the likelihood of confusion analysis, the dissent argued that the court should have concluded that there was a genuine issue of fact and that the district court erred in granting summary judgment.