

The Legal Implication Of Brandjacking And Impersonation Of Trademark Holderson Social Media Networks

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Abstract

The easy access to trademark logos, marks, words and phrases on the social media sites has given much room to the proliferation of unauthorised use of trademarks by a lot of people. This has led to a lot of legal disputes which seems to have no headway a result of the rise in online technology. This work placed more emphasis on the trademark infringement cases perpetuated on social media platforms by some of these brands as well as the various legislations that govern these trademark infringements. trademark infringement on social media has contributed to the general growth of other brands. Regular posting of relevant materials with a distinctive and unique style and tone attributable only to that brand goes a long way to build confidence in the users that the source of the information is official. Until the law is properly modelled to fit the ever growing need for social media protection of trademarks and social media providers improve on the standard of protection attributable to trademark and intellectual property protection, cases of trademark infringements on social media sites will continue to prevail.

1. Introduction

Technology has evolved over the years to become one of the major contributory factors of development in countries all around the world. Today, there are a lot of businesses and organizations that are using technology to boost their business. One of the vital technological areas where most businesses have been to use to ensure that they stay afloat in the competitive market is the social media. These companies use the social media networks to actively enlighten the public about the goods and services that they offer. Due to the multifarious companies that are prevalent on the social media, most companies usually use their trademarked terms or brand names as their identity. This helps the customers to differentiate between similar companies and therefore identify the exact social media profile of a particular company or organization.

However, legal ownership of a trademark or brand name does not just end there as issues may arise from the use of such brand on social media without the authorization of the legal mark holder. It is on this premise that Justice Frankfurter in *Mishawaka Rubber & Wollen Mfg. v S.S. Kresge Co.* (*Mishawaka Rubber*,ⁱ emphatically stated that if there happens to be a likelihood that the trademark or brand name of a brand owner which he created has been used by another, such brand owner can seek redress in a competent court of law. The illegal use of the brand name or trademark of another company on social media can spread so fast in a very short space of time. This is not strange to the fact that technological advancement and the dynamism between hosts of social media networks make it nearly impossible to restrict the unauthorized use of such trademark.ⁱⁱ There have been several reports of the unauthorized use of trademark and brand names of companies which had led to the total winding up of such company. Such brandjacking and impersonation or mark holders can catastrophically devalue the trademark in the capital market, force customers to leave and move over to another company that offers similar products and services or even stir a legal battle in the court of law. Most companies do not want to get involved in such legal battles due to the fact that it has the potency of ruining the image of the company forever. Trademark infringement can occur in various forms which includes without limitation to the following – —Cybersquatting^l; —Facesquatting^l and —Usernamesquatting^l.

Cybersquatting which is simply defined as the intentional act of registering a very prominent and well known trademark as a domain name before the legally verified brand owners can get the opportunity to protect and make full use of the trademark.ⁱⁱⁱ Usually, cybersquatters are in the practice of exploiting existing businesses by registering and using the domain names similar to their trademarks and afterwards, demanding for some amount of money before selling it to the real trademark holders while others actually use it for scam. However, whatever could be the reason for such use; it is usually capable of tarnishing the reputation of the trademark company. On the other hand, facesquatting simply involves the unauthorized use of a picture or mark of another legal owner of such picture or mark. In 2009, Facebook was the major social media site where face squatting took the order

of the day.^{iv} Although in recent time, the company has stepped up its effort in totally eradicating the menace. Usernamesquatting is also similar to facesquatting with the only difference being that the unlawful impersonators create a username similar to a trademark or brand with intent to resell to the rightful owners or use it for fraudulent activities. Nike and Coca-Cola have all been victims of usernamesquatting.^v These forms of trademark infringement shall be discussed extensively in this work.

The dangers of social media brandjacking cannot be overlooked. Most companies have to keep up battling with the need to ensure that they detect social media accounts that use their marks and brands for carrying out illicit activities. However, with the social media platform, this is not really easy to achieve. Regulating the use of trademark can be easily done offline as long as it does not involve the internet. Most scholars in their works have tried to proffer solutions to the problem of brandjacking on social media but it seems that more efforts needs to be put in place to ensure that this problem is curbed. This work will try to study in its entirety, trademarks and its related problems in the international community with reference to the European Union (EU) member state and the United States. Also, the various ways the problem of brandjacking and impersonation of trademark holders on social media can be solved will be explored extensively.

A lot of crimes have also been carried out by these brandjackers using the social media platform. An example can be seen with the incident that involved a public relations company in the United States known as Tanner Friedman. According to the reports, a Twitter account with the username —Tannerfriedman1 was set up by an unknown individual and subsequently, embarrassing tweets about the company were made from the account. The company learnt about this and sued for the reclaim of the account and they won.^{vi} Another important event of unauthorized use of trademark is seen in the case of the fake Nine West—Model Auditions. A fake page was created by an unknown user on Facebook and posts were made asking females that are interested in the model audition to send across pictures of their bodies, toes and face as well as their contact information. Reports revealed that more than three hundred females sent these details to the impersonator before Nine West-Model learnt about this and sued.^{vii} Twitter and Instagram have taken a good step to introduce the —verified1 system. This simply means that individuals and companies can now have their brands verified but this is argued to be applicable only to well known celebrities with a huge amount of followers. In other words, other individual and companies although legal owners of trademarks might have a hard time getting verified on these social media sites. Therefore, the need for a unified transparency of the use of trademark logo on social media should be adopted to drastically reduce the eventuality of brandjacking or impersonation of trademark holders on the social media.

Overview of trademarks

There is no generally accepted definition of trademarks. Even the Paris Convention as well as TRIPS does not give any clear, concise and straightforward meaning of trademark. However, in the EU, attempts have been made by the Community Trademark Regulation^{viii} and the Trademark Directive to give a unified definition of trademark. Under the Trademark Act 1946 also known as the Lanham Act of the United States, trademark is defined thus - *“The term “trade-mark” includes any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.”*

Despite the inconsistency that exists in the definition of the term trademark, a lot of scholars have often agreed on the overwhelming fact that for a better appreciation and understanding of what is termed as a trademark, recourse must be made to the first known use of any sign, symbol, word, object or anything that is commercially linked to an individual or company.^{ix} Member states of the Paris Convention have been empowered by the Convention to ensure that trademark registration is strictly adhered to in accordance with their various domestic laws.^x Trademark falls under two categories in the EU. The first kind of trademark that can be seen in the EU is the national trademark of the various member states which is governed by the local trademark laws of each member states.^{xi} The other kind of trademark is the Community Trademark. The latter is governed by the Community Trademark Directive which is binding on all EU member states. The Office for the Harmonization of the Internal Market (OHIM) is the agency of the European Union that is charged with the responsibility of managing the various community trademarks of the EU member states.

Meaning of Social Media

Social media can be clearly defined as a group of applications that can be accessed through the internet and have the foundational base of Web 2.0 thereby allowing for the exchange of contents generated by various users amongst a particular network of people.^{xii} The Web 2.0 is a technological concept in the World Wide Web (WWW) which uses the internet as a platform for the sharing, storing and retrieval of information in a user - designed pattern.

It is very important to note that the social media deals primarily with the major function of presenting a person's social activities with his or her connections in the online WWW. Therefore, this has unfortunately created room for the exploitation of trademarks by unauthorised persons. For example, if a person carries out very high online social media activities and has a lot of connections, there is every possibility that once the person posts and uses an unauthorised trademark logo on his or her page, within a matter of seconds, the person's connections will have access to such trademark logo and this is where the problem of social media infringement of trademarks begin.

International legislations against trademark infringements

The various relevant international treaties shall be extensively discussed below. It needs to be noted that these legislations have been as a result of conventions held by the international community. One of such international conventions is known as the Paris Convention for the Protection of Industrial Property which is otherwise shortened as the —Paris Convention 1883l.^{xiii} It was signed into law as an international treaty regulating intellectual property in 1883. However, in 1900, a move for the revision of the Paris Convention was advocated for by the international community and this led to its revision in Brussels. In 1911, it was also revised in Washington and further revised in 1925 at The Hague; London took part in the revision in 1934 followed by Lisbon in 1958 before Stockholm hosted the revision in 1967. In 1979, it was finally amended. This was the reason why a lot of scholars have argued that the international property law is highly regulated by the international community. The World Intellectual Property Organization (WIPO) is placed in charge of observing, administering and regulating the Paris Convention and other related intellectual property treaties.

After this convention came another highly acknowledged international legislation governing trademark known as Berne Convention for the Protection of Literary and Artistic Works —Berne Convention 1886l. Unlike the Paris Convention that was signed in Paris, the Berne Convention was signed in Berne as the name implies. However, it was taken to Paris and completed there in 1896. In 1908, it was brought to Berlin and revised but this time around, it was concluded in Berne in 1914. In 1928, 1948, 1967 and 1971, it was further revised at Rome, Brussels, Stockholm and Paris respectively. Finally, it was amended in 1971.

The next internationally recognized treaty for intellectual property protection is the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks which is known as the —Nice Agreement 1957l. It is also administered by WIPO. This work shall also study the provisions of the Trade-related Aspects of Intellectual Property Rights (TRIPS) in respect to the international protection of intellectual property.^{xiv} All members of the World Trade Organization (WTO) are mandated to comply with the provisions of the TRIPS. It is as a result of this mandatory requirement of compliance that gave further recognition and adoption of the Paris and Berne Conventions by other member states. The TRIPS incorporated the provisions of Article 1 – 12 of the Paris Convention and Article 19 of the Berne Convention into its Convention.^{xv} The European Convention on Human Rights (ECHR) is instrumental to the protection of intellectual property in the US and EU.^{xvi} The ECHR as well as the Charter of Fundamental Rights of the EU (EU Charter)^{xvii} makes provision for the freedom of expression and protection of property.

The Paris Convention is notorious in the international community and this is because of the fact that it was the first international treaty governing intellectual property that as enacted. It needs to be noted that all the EU member states and the United States are all signatories to this Convention. The Paris Convention covers largely issues bordering on trade names, marks, patents, industrial designs as well as utility models. There are two principles which the Paris Convention endeavors to capture and they are – priority right and national treatment. By priority right, the Paris Convention clearly means that applicants for trademarks from any member state of the Convention are always at liberty to use the filing date in one of the treaty members as the effective filing date in another contracting state, provided that the applicant files another application within 6 months from the first filing.

The Paris Convention evidently provides that member states that are treaty to the Convention are allowed to institute claims regarding intellectual property infringement in the local jurisdiction of the state where such infringement occurred. Such action will be deemed to have the effect of a right of protection of intellectual property under the local legislation of the host member state.

On the other hand, the principle of —national treatmentl which was established under the Paris Convention clearly provides that all member states of the Convention must treat other citizens of other member states as if they were their own citizens.

Impersonation of brand owners on social media sites

Social media is provided by various networks and they are commonly referred to as —Social Media Sites or Social Media Networks. They are common web-based technological platforms which provides services to the individual users to carry out the following functions –

1. Build a profile which shall comply with the requirements of the system or platform;
2. Share connection with other registered profile users on the system; and
3. View, access and interact with other users via various modes of communication allowed on the platform.^{xviii}

These social media networks can be accessed through the use of their Uniform Resource Locator (URL) which has the domain name for the social media site. Some prominent social media sites include – Facebook.com, Yahoo.com, YouTube.com, Twitter.com, LinkedIn.com, and MySpace, e.t.c. most of these social media sites often requires its registered users to register with usernames and passwords and also include profile pictures for identification of the particular account.^{xix} The uniqueness of social media sites have often been attributed to the visibility of profiles to enable friends, families and co-workers to connect with each other. On the other hand, it has also been posited that the social media networks also allows fans to interconnect with their favourite celebrities, businesses, bands and other corporate organizations.^{xx} An example can be seen when someone signs up as a follower of the President of the United States of America on Twitter and thereby sees tweets (posts) made by the POTUS. The social media networks has made it possible for a lot of people to come together to create groups that share a common interest.

The social media networks have provided trademark holders with a lot of benefits and one of them includes the ability for brand owners to market their goods and services to their customers. Another important benefit is the creation of a platform whereby the mark holders can be able to interact with their customers and be able to monitor and meet the changing needs of the market. With the endless benefits that these social media networks offer, it seems that the flaws are being overlooked. Trademark infringement was not so prevalent until the introduction of the social media. This has led to a high rate of trademark infringements in various parts of the world. A lot of imposters have created fake social media profiles with the aim of using the trademark of another person or company to perpetuate their bad intentions and users unknowingly connect and follow these fake accounts with the believe that they are the true owners of such brands.

Most of the times, the individuals behind these fake social media accounts tend to carry out activities which appear so real that the public will be deceived into believing that they are the real owners of the brand. Most fake accounts on Facebook are likely to be believed to be true because of the reverence given to the social media sites. Also, an account that is verified on Twitter or Instagram is also believed to be real by the public. The imposters can be able to use the pictures, marks or logos of the real company which was copied from the internet and maybe an email with a name structure reflecting the real company might pass as sufficient evidence to the public to believe the account to be real.^{xxi} Impersonation of trademark holders can lead to a very terrible situation if the followers believe and perform most tasks posted by the fake account. Identity theft, spamming or even phishing can be the consequent results of following these fake accounts on these social media sites.^{xxii} Where a mark holder has been impersonated, the imposter might deceive the public into purchasing goods and services which might be of very low quality. This can lead to a situation whereby the aggrieved user tries to sue to the company for such deceit. This will also lead to a decline in the patronage given to the mark holder as people would not want to fall victims of such impersonation and suffer huge loss.

A lot of companies have started to adopt a new way of preventing usernamesquatting on Facebook, Twitter and other social media sites. Some of the companies even go as far as signing an agreement with their employees or other persons whom they have a business relationship with to refrain from using the company's marks in an unauthorized manner on social media sites. A lot of people have argued that this might likely hamper the free flow of information and ideas. These companies understand that social media networks hosts millions of individuals and it is possible for their marks to be used intentionally by any imposter. This is the reason why they overlook the stress, time and money that might be involved in registering all usernames that may likely be used by any imposter to impersonate their brands on various social media networks. This move is quite a commendable one seeing the length of damage that brandjacking can cause a company in the long run. However, it has been argued that it is only attributable to top social media sites and would rather be hard to implement in almost all the social media sites currently operating in the World Wide Web.

It is pertinent to note that it is not all persons that register usernames or accounts are impersonators despite the fact that the accounts might contain words or phrases that are similar or identical to a trademark owned by another person. Some people can actually rely on the First Amendment protection on freedom of expression^{xxiii} when they use the trademark of a person without authorization to convey information and ideas. Another important instance where the unauthorized use of the trademark of another may not be classed as trademark infringement is in the creation of fan pages for brands on various social media sites. The activities of the person

making unauthorized use of such trademark is employed in determining if such a person may be termed to be an impersonator or supportive fan of the brand. For example, where a person opens a Facebook page for a brand such as Coca-Cola, such a person might actually may provide relevant information about the brand holder to the employees, customers and potential investors and it might not be termed as trademark infringement provided that the a reasonable man can be able to decipher that such information was not intended to be seen as directly emanating from the mark holders or representatives. The test of reasonableness can also be used in the event wherein the unauthorized use of the trademark is said to be merely a prank.

Popular social media networks such as Facebook, Twitter and MySpace actually places strict emphasis on the prohibition of all forms of impersonation of brand owners on the platform. Most social media providers have urged trademark holders to always ensure that they report all unauthorized use of their trademarks by any account. This has been adjudged to be the best and fastest way to curb the menace of trademark infringement on social media platforms. When this report is made to the social media site, they will have carry out adequate investigation of the account and thereafter suspend or terminate the account. This will help to exempt most of these social media sites from contributory infringement. It is however important to note that these social media sites tend to disrupt the free flow of information and ideas by deleting the account which contains various posts about the mark holder. Some of these social media sites allow marks to be freely used on accounts for parody, commentary or other promotional uses without authorization from the mark holders.

Despite the various cases of trademark infringement on social media networks, it is still very unclear with regards to how the trademark law can be applied to these cases. One of the notorious trademark infringement cases perpetuated on social media sites is the case of *New York City Triathlon v. NYC Triathlon Club*. In this case, the plaintiff filed a preliminary objection before the United States District Court, S.D New York to restrain and prevent the defendant from using the following words which are the trademarks of the plaintiff - "NYC Triathlon Club," "NYC Tri Club," and "New York City Triathlon Club". The court delivered judgement in favour of the plaintiff while relying on various factors including the Lanham Act.

Some of the courts are most likely to base their decisions on the fact that the imposter is using the mark to advertise and sale goods and services. Other courts might also base their judgements on the likelihood or prevalence of confusion emanating from the unauthorized use of such mark. A lot of authors have advocated for the need to balance free speech in line with trademark infringement laws to ensure that there is no conflict which may arise as a result of balancing both of them in trademark infringement cases.

At this juncture, it needs to be reiterated that there are defences which may be raised in a trademark infringement case. The infringer may rely on the fact that the expression is duly protected under the First Amendment and also, in the event wherein such unauthorized use was not for the purpose of selling or advertising goods and services. Although this defence might not really be sufficient enough bearing in mind the current legislations on copyright infringement. Where the mark is being used by the infringer to impersonate the mark holder thereby causing confusion amongst the public in respect to the actual ownership of the account and all the information provided by the account, the aggrieved mark holder can sue the infringer for violation of the Lanham Act.

The Lanham Act clearly provides that for an infringement to be deemed to have occurred, the infringer must have engaged in commercial activities of the mark or brand for the purpose of advertising and selling goods and services that create confusion, mistake or deception.^{xxiv} Therefore, for a trademark holder to be able to clearly establish a valid and overwhelming claim for trademark infringement on social media sites, such a person must make sure that the infringer used such unauthorized mark for commercial purposes and in so doing created a confusion amongst the public.

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