



Evidence of Likelihood of Confusion: A Brief Overview

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When attempting to prove a trademark infringement claim the fundamental inquiry is whether the defendant's use of its mark is "likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C.A. § 1114(1). The "likelihood of confusion" test serves as the foundation of a trademark infringement case. But how do you prove a likelihood of confusion? Does it require that 99 out of 100 buyers are likely to be confused by the similar mark or do a few isolated incidents of confusion suffice? Case law has indicated that in order to be liable for trademark infringement an "appreciable" or "substantial" number of reasonable buyers are likely to be confused by the use of a similar mark. However, what constitutes an "appreciable" or "substantial number" is not clearly defined and, while a majority is not required, there is no specific threshold that must be reached.

More importantly, how do you prove a likelihood of confusion? Can you simply put the mark's side by side to demonstrate their similarity? The three evidentiary mechanisms that can be used to prove a likelihood of confusion consist of: (1) survey evidence; (2) evidence of actual confusion; and/or (3) a judicial comparison of the marks in the context of their use. Evidence of actual confusion serves as strong proof of likelihood of confusion. However, such evidence is often difficult to obtain and if only a few instances of actual confusion occurred, it may be deemed *de minimis* or inconsequential. Additionally, the incidents of confusion must be placed in the context of the number of opportunities for confusion in order to determine the weight such evidence should be afforded. For instance, if the mark is utilized on products sold at retailers around the nation and has significant sales volume, a couple of isolated instances of actual confusion will likely be considered *de minimis*. Moreover, it is important to document all instances of actual confusion so that such evidence is available when needed.

In cases where evidence of actual confusion is not available or where such evidence is not persuasive, survey evidence may be utilized. While survey evidence is useful in determining the impact the infringing mark has in the marketplace, the surveys are subject to strict standards and must be adequately conducted. Therefore, prior to conducting a survey, several factors must be considered including the population or group to be questioned, the design of the questionnaire, and the method of soliciting responses.

Finally, a judge may draw upon his or her own experience and observations in determining whether there is a likelihood of confusion. However, in making such a determination the judge must analyze whether an ordinary prudent purchaser in the marketplace would be confused. Therefore, the state of mind that is important is not the parties to the case but the ordinary consumer in the context of making a purchasing decision.

If your institution has questions or concerns about this topic and you would like further information, please email Karen I. Levin at klevin@cullenanddykman.com or Cynthia M. Thomas at cthomas@cullenanddykman.com.