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THE NEW OLD SPICE: BUSINESS IDENTITIES, TRADEMARKS, AND SOCIAL MEDIA

*Lesli Harris**

I. INTRODUCTION

In 2010, with the airing of a single commercial, Old Spice rebranded itself from the company of the whistling sea captain waiving a bottle of aftershave that your grandfather used to wear into a cooler-than-thou company targeting twenty-something men. The commercial—commonly referred to as “The Man Your Man Could Smell Like”—features actor Isaiah Mustafa confidently touting that “anything is possible” if you use Old Spice body wash as he strides seamlessly through a bathroom shower to a sail boat to riding a horse on the beach.¹ The commercial ends with Mustafa making the final, random statement: “I’m on a horse!” followed by the familiar whistling jingle of the 1970’s Old Spice commercials.²

The thirty-second commercial was an instant success. As of April 12, 2011, the commercial had over forty million hits on YouTube.³ Facebook users (including this author) uploaded it to their accounts to share with friends and became “fans” of the brand. The commercial won critical acclaim as well, winning the Grand Prix for film at the Cannes Lions International Advertising Festival and a Primetime Emmy Award for Outstanding Commercial.⁴

Old Spice capitalized on the success of the commercial, the popularity of Isaiah Mustafa, and its complete rebranding for a younger audience through the use of social media. The company produced a series of videos accessible on its website and on the Old Spice YouTube channel featuring

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1. *Old Spice—The Man Your Man Could Smell Like*, YOUTUBE, <http://www.youtube.com/watch?v=owGykVbfgUE> (last visited June 4, 2012).

2. *Id.*

3. *See id.*

4. *latest innovations*, PGINNOVATION.COM, http://www.pg.com/en_US/downloads/innovation/fact_sheet_OldSpice.pdf (last visited July 17, 2012).

Mustafa in character answering questions posed to him by Old Spice fans via Twitter and Facebook. In fact, the Old Spice YouTube channel has become one of the most viewed channels.⁵ The company's current Facebook page features the new Old Spice guy posting daily comments such as: "Power outages are a significant problem when you're keeping an alien with a grenade launcher for an arm in your cryogenic freezer," and "What is the only occupation more honorable than that of being a teacher? Scuba instructor. Because they teach underwater."⁶ The new Old Spice guy tweets at least twice a day and has over two hundred thousand followers.⁷ Old Spice is now the #1 body wash brand for men.⁸

And while the company has seemingly mastered the art of promotion through social media, it has retained its traditional trademarks. Its website, Facebook page, and Twitter account all bear the recognizable red and white scripted "Old Spice" word mark and stylized ship trademark.⁹ All of the commercials end with the Old Spice whistle jingle.¹⁰

Using the Old Spice campaign as an example, this Article will explore the use of trademarks and traditional branding in social media, as well as a variety of legal pitfalls companies face when promoting their brands via social media.

II. TRADEMARK BASICS

The Lanham Act governs federal trademark registration and protection.¹¹ The Lanham Act defines a trademark as "any word, name, symbol, or device, or any combination thereof" used in commerce to identify and distinguish the goods of one manufacturer or seller from those of another "and to indicate the source of the goods."¹² A trademark is typically a logo such as McDonald's Golden Arches or a phrase like Nike's "Just Do It." However, trademarks can also consist of a color (like Owens Corning pink insulation) or a tune such as the NBC three-note chime.¹³ Essentially, a trademark is a device that allows a company to "brand" itself and distinguish its goods and services from its competitors. If another company uses a confusingly similar trademark to promote competing or even related

5. Jack Neff, *How Much Old Spice Body Wash Has the Old Spice Guy Sold?*, ADVERTISING AGE (July 26, 2010), <http://adage.com/article/news/spice-body-wash-spice-guy-sold/145096/>.

6. See *Old Spice*, FACEBOOK, <http://www.facebook.com/OldSpice> (last visited June 4, 2012) [hereinafter *Facebook Page*] (these posts were made on April 12, 2012 and April 11, 2012, respectively).

7. *Old Spice*, TWITTER, <https://twitter.com/#!/OldSpice> (last visited June 4, 2012).

8. John Reid Blackwell, *Procter & Gamble executive says innovation is key*, RICHMOND TIMES-DISPATCH, Feb. 16, 2012, <http://www2.timesdispatch.com/business/2012/feb/16/tdbiz03-procter-amp-gamble-executive-says-innovati-ar-1692557/>.

9. See OLD SPICE, <http://www.olds spice.com/> (last visited June 4, 2012) [hereinafter OLD SPICE WEBSITE]; *Facebook Page*, *supra* note 6; *Old Spice*, TWITTER, <https://twitter.com/#!/OldSpice> (last visited June 4, 2012).

10. See *Terry Crews—Crazy Old Spice Commercials*, YOUTUBE, <http://www.youtube.com/watch?v=LCl5uyn5K7k> (last visited June 4, 2012).

11. See 15 U.S.C. §§ 1051–1141 (2006).

12. 15 U.S.C. § 1127 (2006).

13. For a listing of common trademark tunes, see *List of Sound Trademarks (Sensory Marks)*, <http://www.activatedspace.com/Installations/endangeredounds/USA%20Registered.html>.

products, the trademark owner can seek damages and injunctive relief for trademark infringement.¹⁴ Thus, for example, Owens Corning's registration of the color pink for insulation prevents a competitor from using the color pink for its insulation.

The Lanham Act permits registration of trademarks with the United States Patent and Trademark Office ("USPTO"). While registration of a trademark is not mandatory,¹⁵ registration confers a number of benefits, including nationwide notice of ownership of the mark as well as a legal presumption of ownership and exclusive right to use the registered mark.¹⁶ Further, a registered mark that has been in continuous use for five years becomes incontestable, which precludes several defenses to an infringement action.¹⁷ Finally and most importantly, in some cases of third-party infringement of a trademark owner's rights, the Lanham Act provides for statutory damages, attorney's fees, profits, and costs.¹⁸ Registration of a trademark is an important economic tool for businesses to protect their brands.

III. MEDIA, SOCIAL MEDIA, AND BRAND PROMOTION

Use of social media to promote a brand is not new. Think, for instance, of "I Love Lucy" television episodes. Phillip Morris and Macy's Department Store sponsored the show. Thus, you can see packs of Phillip Morris cigarettes lying around Lucy and Desi's apartment. Lucy and Ethel would discuss their shopping trips at Macy's. This strategic placement of products bearing a company's trademark not only created brand consciousness but also associated the product with popular television shows and celebrities. Companies continue to use traditional media product placement in television and movies to promote their brands. In an episode of "Smallville" sponsored by Old Spice, Old Spice deodorant can be seen in Clark's locker.

In the early years of the Internet, companies promoted their products through static, non-interactive websites that simply provided information, as well as through pop-up ads and banner advertising. But now we are in the age of Web 2.0, which allows Internet users to interact with one another and share information on an instantaneous basis. Thus, rather than the static website of ten years ago, savvy business owners are creating websites that entertain and allow their consumers to interact with the company. The Old Spice website, for example, allows consumers to watch commercials and purchase products (including swag like t-shirts, hats, and a "Boat

14. See 17 U.S.C. § 502 (2006).

15. Unregistered marks can find protection in federal and state common law, as well as under specific state statutes and laws.

16. 15 U.S.C. § 1072 (2006).

17. 15 U.S.C. § 1064 (2006).

18. 15 U.S.C. § 1117 (2006).

Buckle”).¹⁹ Notably, the Old Spice website also links to the brand’s Twitter, Facebook, and YouTube accounts.²⁰

Facebook, Twitter, and YouTube have become important tools for companies to interact directly with their customers. Facebook allows customers to “like” the company and suggest the company to their social network of friends. Companies can create official “vanity” pages using their trademarked names. For instance, the URL for Old Spice’s official Facebook page is www.facebook.com/OldSpice. Similarly, YouTube and Twitter allows companies to register their trademarked names as sub-domain URLs.²¹ All of these social media tools allow consumers to communicate with the company and its spokesmen by posting comments and questions.

IV. SOCIAL MEDIA QUAGMIRE: CYBERSQUATTING, TWITTERJACKING, AND FACEBOOK IMPERSONATION

A trademark owner has the legal responsibility of policing their own marks to ensure that no third-parties are using the same or confusingly similar trademark in commerce. Failing to properly police a mark can result in abandonment of the trademark.²² Thus, a trademark owner must continuously search for and prevent third-party use of the trademark in commerce. In this Web 2.0 age of immediate Facebook and Twitter postings, as well as easy access to counterfeit websites, proper policing of trademarks can be difficult, if not impossible. Moreover, because third-party users of trademarks do not always attempt to sell products in connection with the use of the trademark—for example Facebook “fan” pages—the issue becomes whether the third-party’s use in social media constitutes “use in commerce” sufficient to constitute trademark infringement. Some common misuse of trademarks include cybersquatting, Twitterjacking, and Facebook impersonation. To prevent trademark infringement, companies must use not only legal remedies but also terms-of-use policies of the particular social media website.

A. *Cybersquatting*

Cybersquatting is the unauthorized registration of another’s trademark as a domain name.²³ An example of cybersquatting would be Axe Body Wash registering www.Oldspice.com. Common cybersquatters are so-called “domain name trolls” which are entities that purchase domain names and try to sell them to the actual trademark owner. There are two legal remedies for cybersquatting: the Uniform Domain Name Dispute

19. OLD SPICE WEBSITE, *supra* note 9.

20. *Id.*

21. See *Old Spice*, YOUTUBE, www.youtube.com/oldspice (last visited June 4, 2012).

22. See *Hermes Int’l v. Lederer de Paris Fifth Avenue, Inc.* 219 F.3d 104, 110 (2d Cir. 2000).

23. See, e.g., *Interstellar v. Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 946 (9th Cir. 2002).

Resolution Policy (“UDRP”) and the Anticyberquatting Consumer Protection Act (“ACPA”).

The UDRP is an arbitration proceeding presided over by the World Intellectual Property Organization (“WIPO”).²⁴ Quick resolution is the main benefit of pursuing cybersquatting claims under the UDRP. Under the UDRP, a claim can be resolved in as little as forty days.²⁵ The rules governing the UDRP set forth a strict timeline once a party submits a complaint.²⁶ After the complaint and fees are submitted, a dispute resolution provider reviews the complaint for administrative compliance with the UDRP policies and rules.²⁷ Within three days of submission, the provider forwards the complaint to the cybersquatter.²⁸ The respondent then has twenty days of the date of commencement to respond to the complaint.²⁹ If the respondent does not respond, the arbitrator will decide the dispute based solely on the complaint and the allegations will be construed as an admission against the respondent.³⁰ However, if the alleged cybersquatter submits a response, the provider will appoint an arbitrator within five days of receiving the response.³¹ Within fourteen days of appointment of the arbitrator and in the absence of exceptional circumstances, a written decision will be issued that determines whether the disputed domain name should be transferred.³²

The other benefit of the UDRP is that the analysis is relatively straightforward. The complaining party must prove that they have trademark rights in the domain name. The arbitrator then considers whether: (1) the domain name registered by the respondent is identical or confusingly similar to a trademark or service mark in which the complainant has rights; (2) the respondent has any rights or legitimate interest in the domain name; and (3) the domain name has been registered and is being used in bad faith.³³ If the trademark owner proves these elements, the domain name will be transferred to trademark owner.

There are, however, several important downsides to the UDRP. First and most importantly, a UDRP decision is not binding on any subsequent

24. *Uniform Domain Name Dispute Resolution Policy*, ICANN (Oct. 24, 1999), <http://www.icann.org/en/help/dndr/udrp/policy> [hereinafter *UDRP*].

25. *See Rules for Uniform Domain Name Dispute Resolution Policy*, ICANN (Oct. 30, 2009), <http://www.icann.org/en/help/dndr/udrp/rules> [hereinafter *UDRP Rules*].

26. *Id.* The UDRP does not provide for an actual hearing. Instead, the parties must brief the case and submit their briefs electronically. The arbitrator will make a decision based on the written submissions.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See, e.g.,* PepsiCo, Inc. v. RaveClub Berlin, 2001 WL 1752536 (UDRP-ARB Dec. 19, 2001).

31. *UDRP Rules*, *supra* note 25. Note that typically a dispute is decided by a single arbitrator. However, at a higher cost, either party may request a three-member panel. The cost of a single-arbitrator panel under the UDRP is \$1,500; a three-member panel is \$4,000. *Schedule of Fees under the UDRP (valid as of December 1, 2002)*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/amc/en/domains/fees/index.html> (last visited July 17, 2012).

32. *Id.*

33. *See Uniform Domain Name Dispute Resolution Policy*, ICANN (October 24, 1999), <http://www.icann.org/en/help/dndr/udrp/policy>.

litigation between the parties or even persuasive evidence for a court to consider.³⁴ Second, the UDRP expressly allows judicial intervention before, during, or after a claim is brought under the UDRP.³⁵ Thus, cybersquatting claims could be litigated twice—once under the UDRP and once in federal court—eliminating the cost-benefit of a UDRP action. And because the UDRP does not permit transfer of a domain name until resolution of all other judicial action involving the domain name,³⁶ a respondent can “block” enforcement of a UDRP decision by filing suit before transfer of the domain name is complete. Indeed, in the Fifth Circuit, at least one case involved a “blocking” action brought by the respondent to delay transfer of a domain name pursuant to a UDRP decision.³⁷ Thus, the finality that a trademark owner could achieve in a federal court action is absent from a UDRP decision.

The Anticybersquatting Consumer Protection Act (“ACPA”) is the second legal means of stopping a cybersquatter. The ACPA is a federal statute that prohibits the registration, use, or trafficking of a domain name that is identical or confusingly similar to a famous trademark with a bad-faith intent to profit from that mark.³⁸ Unlike the UDRP, the ACPA allows recovery of statutory damages for each violation and attorney’s fees, even if the defendant fails to respond to the complaint and a default judgment is issued in favor of the plaintiff.³⁹

Two issues arise under the ACPA. First, the analysis a court undertakes before issuing a preliminary or permanent injunction is more rigorous than the analysis under the UDRP, which is simply whether the domain name is confusingly similar to the complainant’s mark and whether there was bad-faith registration and use. Conversely, a plaintiff seeking injunctive relief in federal court must demonstrate that “(1) it has suffered irreparable injury; (2) remedies at law are inadequate to compensate for that injury; (3) a remedy in equity is warranted in light of balancing the hardships between the plaintiff and defendant; and (4) the public interest would not be disserved by a permanent injunction.”⁴⁰ As with the UDRP, if the cybersquatter does not respond to the lawsuit, a court will still consider these factors and will likely issue a judgment in favor of the trademark owner.

34. See, e.g., *S. Co. v. Dauben, Inc.*, 324 Fed. App’x 309, 316 (5th Cir. 2009) (a decision under the UDRP is entitled to no deference under the ACPA); see also *Barcelona.com, Inc. v. Excelentísimo Ayuntamiento De Barcelona*, 330 F.3d 617 (4th Cir. 2003) (same).

35. *S. Co.*, 324 Fed. App’x at 316.

36. *UDRP*, *supra* note 24.

37. See *S. Co.*, 324 Fed. App’x at 311 (noting that defendant filed suit in state court to prevent transfer of disputed domain names in accordance with a UDRP decision).

38. 15 U.S.C. § 1125(d)(1)(A) (2006).

39. See *DameWare Dev., L.L.C. v. N. Software, S.A.*, No. 02-3238, 2003 WL 1341209, at *2 (E.D. La. Mar. 12, 2003) (finding violation of ACPA and granting reasonable attorney’s fees against defaulting defendant); see also *Taverna Opa Trademark Corp. v. Ismail*, No. 08-20776-CIV, 2010 WL 1838384, at *4–5 (S.D. Fla. May 6, 2010) (granting default judgment against former employee under ACPA, awarding \$10,000 in statutory damages, issuing a permanent injunction prohibiting defendant from using mark, and considering award of attorney’s fees upon further documentation of amount incurred).

40. See *Taverna Opa Trademark Corp.*, 2010 WL 1838384 at *3.

The second issue is that the ACPA contains a “bad-faith” element that is similar to that under the UDRP. The ACPA sets forth a nonexclusive, nine-factor, “bad-faith” test for the court to consider, including whether the defendant had any trademark rights in the name.⁴¹ Courts, however, have found bad-faith intent to profit where the defendant offers competing services, where a defendant “mousetraps” visitors in the website, and where the defendant displays images and other content antithetical to the plaintiff’s company.⁴² Courts have also found a defendant’s failure to comply with a “cease-and-desist” letter—without the belief of a legitimate claim of the right to continue to engage in the conduct—evidence of bad faith.⁴³

Despite the additional evidence that a federal court must consider to issue an injunction under the ACPA, there are several benefits to the federal action. If the cybersquatter does not respond to the complaint, a court can issue a default judgment fairly quickly. The federal action also provides the trademark owner with a measure of finality that is not present with the UDRP procedure, as well as the possibility of a judgment for statutory damages and attorney’s fees.

B. Twitterjacking, Facebook Imposters, and Infringement on YouTube

Because social media tools are relatively new, there are fewer established legal remedies for trademark infringement on these sites. Indeed, the UDRP only covers potentially infringing primary domain names. Consequently, subdomain names such as www.Facebook.com/oldspice are not subject to the UDRP. Similarly, the ACPA only applies to domain name “registered with or assigned by any domain name registrar.”⁴⁴ The Senate report on the ACPA defined “domain names” to exclude “screen names, file names and other identifiers not assigned by a domain name registrar or registry.”⁴⁵ Accordingly, companies seeking to stop trademark infringement on social media websites must turn to terms of use policies and dispute resolution procedures provided by particular websites.

Twitter does not require a user to verify their identity before setting up an account. As a result, many fake and parody Twitter accounts exist, such as “@FakeLilWayne.” Twitter has its own policy against “Twitterjacking”—username squatting and selling usernames. Twitter’s official trademark policy is as follows: “Using a company or business name, logo, or other trademark-protected materials in a manner that may mislead or confuse others with regard to its brand or business affiliation may be considered a trademark policy violation.”⁴⁶ Upon receipt of an allegation of

41. 15 U.S.C. § 1125(d)(1)(B)(i) (2006).

42. *See S. Co.*, 324 Fed. App’x. at 319 (discussing examples).

43. *N. Light Tech, Inc. v. N. Lights Club*, 236 F.3d 57, 65 (1st Cir. 2001) (approving district court’s use of a defendant’s disregard of a legitimate cease-and-desist letter as evidence of bad faith).

44. 15 U.S.C. § 1127 (2006).

45. S. REP. NO. 106–140, at 10 (1999), available at <http://www.gpo.gov/fdsys/pkg/CRPT-106srpt140/pdf/CRPT-106srpt140.pdf>.

46. *Trademark Policy*, TWITTER (Feb. 14, 2012), <https://support.twitter.com/articles/18367-trade-mark-policy#>.

infringement by a trademark owner, Twitter may suspend the infringing account if “there is a clear intent to mislead others through the unauthorized use of a trademark.”⁴⁷ If it appears that the account is only confusing to other users, Twitter allows the account user to “clear up any potential confusion.”⁴⁸

Like Twitter, Facebook does not authenticate the identity of its users. Thus, users can create accounts that “impersonate” famous people or companies and can also establish “fan” pages that incorporate a company’s trademark. Facebook has an internal trademark infringement policy that provides some remedy to trademark owners.⁴⁹ Facebook’s “Notice of Intellectual Property Infringement (Non-Copyright Claim)” online form requires trademark owners to detail the specific infringing conduct.⁵⁰ Upon investigation, if Facebook finds trademark infringement, Facebook will immediately take down the page.⁵¹

YouTube also has a policy against username squatting and allows trademark owners to fill out a form complaining of infringement. Its written policy, however, completely distances the site from any infringement battles:

If you are a trademark owner and you believe your trademark is being infringed due to a username issue, please note that YouTube is not in a position to mediate trademark disputes between users and trademark owners. As a result, we strongly encourage trademark owners to resolve their disputes directly with the owner of the username. Trademark owners can contact the user through YouTube’s private messaging feature.⁵²

In essence, trademark owners must contact the infringer to attempt resolution.

These policies demonstrate that social media websites are reluctant to become involved in trademark disputes. There are several reasons for this approach. First, as noted above, trademark owners are required to police their own trademarks. Social media sites cannot monitor the massive volume of information posted by users. Second, unlike copyright law and the Digital Millennium Copyright Act,⁵³ the Lanham Act provides no safe harbor for websites that host content, and there is an argument that these websites could be liable for secondary liability for trademark infringement.

47. *Id.*

48. *Id.*

49. *See Reporting Trademark Infringements*, FACEBOOK, <https://www.facebook.com/help/?page=263316373748169> (last visited June 4, 2012).

50. *Id.*

51. *Id.*

52. *YouTube Username Policy*, YOUTUBE, <http://support.google.com/youtube/bin/answer.py?hl=en&answer=151655> (last visited June 4, 2012) (select the Trademark link).

53. Digital Millennium Copyright Act, 17 U.S.C. §§ 512, 1201–05, 1301–32 (2006).

Finally, users of social media cannot connect and communicate about particular products without actually using a specific trademark. For example, how can you talk about the new Old Spice guy without using the trademark name “Old Spice”? More fundamentally, does a post about a product even constitute “use in commerce” without any attendant attempt to promote or sell competing goods?

IV. CONCLUSION

As social media expands, it is likely that federal trademark law will catch up and create statutory safe harbors for social media sites, as well as better means of preventing trademark infringement. Until then, companies like Old Spice will continue to use these social media to create innovative branding campaigns and connect with consumers. “I’m on a horse!”



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