

An Impersonation Theory of Trademark Law

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When third parties use the trademarks of others without authorization in expression, they are often accused of trademark violations. For example, when the company Think Geek advertised a product called “Radiant Farms Canned Unicorn Meat” using the slogan “Unicorn—the new white meat” as part of an April Fools prank on its website, the National Pork Board sent a cease and desist letter claiming that Think Geek infringed and diluted its trademark rights in the slogan “The Other White Meat.” Bosley Medical sued Michael Kremer when he used the Bosley Medical mark in a domain name which linked to a cybergripe website where Kremer criticized the company. People for the Ethical Treatment of Animals convinced a court to enjoin Michael Doughney from using its PETA mark in the domain name www.peta.org which linked to Doughney’s “People Eating Tasty Animals” website. A court held anti-abortion/pro-life activist Richard Bucci could not use the Planned Parenthood mark in the domain name and content of a website that suggested the markholder was the source of the expression on the site. Nine West filed suit to stop an imposter from using its mark in a fake Nine West-Model Auditions group page on Facebook with the alias “Nine West Shoes” that solicited females interested in model auditions to send photographs of their faces, bodies, and toes with their contact information. This article argues that current trademark doctrines and theories do not adequately provide guidance on how to balance trademark rights and the right to freedom of expression in cases involving unauthorized use of another’s mark in expression. This article develops a new “impersonation theory” for resolving conflicts between trademark and free speech rights in disputes involving expressive uses of marks. It argues that impersonation of a trademark holder should be a necessary, but not sufficient, condition for trademark liability in cases involving unauthorized use of trademarks in expression.