

# Class 22: Trademark Use And Likelihood Of Confusion

- Administrative
  - Next Time: 736-40 and Handout (18 Pages)
  - No Office Hours Today
  - Also posted: past exams and powerpoint from Haislmaier class
- Last Time
  - Trade Dress Recap ⊕

- Elements Required for Infringement
  - Valid Mark
  - Trademark Use**
  - In Commerce
  - In Connection with the Sale or Advertising of Goods or Services
  - Without P's Consent
  - Likelihood of Confusion**

## Tests

- Trademark Use
    - Rescuecom
      - Basic Facts
        - AdWords: You pay Google depending on which search terms you would like associated with your ads.
        - Competitor bought "Rescuecom" so its ads would appear (along with other search results) when user typed Rescue-
      - Preliminary: What about other elements?
        - In Commerce?
        - Without P's Consent?
        - In connection with the sale of goods or services?
        - Likelihood of Confusion?
      - Held
      - Reasoning
      - Sensible Doctrine? ⊕
- Not banner ads.
- Is fact on page 4 true: "D does not always identify sponsored links as ads and it designs those appearing at the top of the search results to look like part of the non-sponsored search results. ⊕"
- One of the words sold was "Rescuecom" ⊕

**Class 22: Trade-mark Use And Likelihood Of Confusion**

Likelihood of Confusion

The essential test for TM infringement.  
The use of a similar mark is only infringement if it is likely to confuse the consuming public.

Threshold: The closer the market segments, the less similar the marks need to be to confuse.

- 1. Directly competing products
- 2. If products are related but don't compete directly
- 3. If products are completely unrelated

Basic Facts

- AMF sells Slickcraft Boats
  - Since 1954.
  - Target market: General Family Recreation
    - fishing, water skiing, pleasure cruises, sunbathing.
    - Promotional material: family fun.
- Nescher sells "Sleekcraft" boats.
  - Since late 1968.
  - Target market: high speed recreation.
    - "Not for families"
    - No kids in promotional photos.
- Both successful.

The Eight Factors

- 1. Strength of the Mark ✓ for D
- 2. Proximity of the Goods ✓ for P
- 3. Similarity of the Marks ✓ for P
- 4. Actual Confusion ✓ for D
- 5. Marketing Channels ✓ Neutral
- 6. Type of Goods / Purchaser Care ✓ for D
- 7. Intent
- 8. Likelihood of Expansion

Result:

WHO must be confused?

Problems