

Searching for a “Use”: Search Engines, Keywords, and Trademark Law

Chris Page*

I. INTRODUCTION

Bill goes to his local mall intending to buy a new outfit for an upcoming date.¹ Bill wants to buy jeans and a t-shirt from Cool Guy Clothes, a national chain of stores specializing in casual menswear. While walking through the mall, Bill notices Dapper Don Clothes, located next to Cool Guy Clothes. Dapper Don Clothes, another national chain specializing in casual menswear, places all Dapper Don stores as close as possible to Cool Guy Clothes as a business strategy. This strategy pays off here, because Bill visits Dapper Don Clothes. While there, he purchases a rugby shirt and two pairs of jeans. Although Bill came to the mall to shop at Cool Guy Clothes, he never even sets foot in the store, having spent all his money at Dapper Don's.

Jen owns a local flower shop called “Jen's Flowers.” She retains a number of loyal customers, but struggles to attract new business. She takes out an ad in the local phone directory in the hope that it will draw more attention to her business. Jen specifies to the phone company's advertising salesperson that she wants her ad to appear next to the listing of her main competitor, “FlorALL.” The phone book publisher makes a note of this and assures Jen it will not be a problem.

Under these scenarios, neither business needs to worry about legal recourse from its competitors in a trademark law context.² Trademark law has two main goals: (1)

* J.D. Candidate, May 2010, Temple University James E. Beasley School of Law; Bachelor of Science, August 1999, Syracuse University. I would like to thank Professor David Post for his assistance and advice throughout the writing process and my wife Vanessa for her love and support.

¹ All names and stores in these introductory hypotheticals are fictional. The fact patterns utilized here borrows from hypotheticals employed by Judge Berzon in her concurring opinion for *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1035 (9th Cir. 2004) (Berzon, J., concurring) (illustrating real world examples of strategic consumer distraction that do not create trademark infringement issues).

² *Cf. Boston Duck Tours, L.P. v. Super Duck Tours, L.L.C.*, 527 F. Supp. 2d 205, 208 (D. Mass. 2007) (noting that an ad distinguishing a business from its competitor “is fair, albeit aggressive, competition not prohibited by the Lanham Act.”).